COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 021546-08**

John Goodwin	Employee
The Emporium	Employer
Norfolk & Dedham Mut. Fire Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Calliotte)

The case was heard by Administrative Judge Rose.

APPEARANCES
Steven M. Buckley, Esq., for the employee
Joseph S. Buckley, Jr., Esq., for the insurer

KOZIOL, J. The insurer appeals from a decision finding the employee's medical treatment for recurrent pneumonia was causally related to his industrial injury of August 5, 2008, and ordering the insurer to pay for § 30 medical benefits, at "board rates for any and all causally related medical expenses." (Dec. 4.) Finding merit to one of the insurer's two claims of error, we recommit the case for further findings of fact.

On August 5, 2008, the employee fell from a ladder at work, injuring his cervical and lumbar spine. Two subsequent back surgeries provided only "partial relief" of his pain, (Dec. 3), and he currently receives § 34A permanent and total incapacity benefits.[1]

The employee filed the present claim seeking payment of medical treatment for pneumonia, which he claimed was a causally related sequela of his injury. (Dec. 2.) Although the judge awarded payment of the requested benefits at

[1] The judge characterized this dispute as pertaining to a claim for "post-lump sum medical treatment." (Dec. 3.) However, the employee testified, (Tr. 15-16), and the insurer confirms, (Ins. br. 4), that the employee continues to receive weekly benefits. In addition, the department's case management system, (CMS), does not show that any settlement has been approved. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file).

conference, his order purported to stay payment in the event of an appeal.[2] (Dec. 1.) The insurer appealed and the employee was examined by a § 11A impartial medical examiner, infectious disease specialist Dr. William Swiggard. Subsequently, the judge found the matter to be medically complex and authorized the submission of additional medical evidence. (Dec. 2.)

In his decision, the judge found, in relevant part, "[o]n May 10, 2010, [the employee] was seen at Mercy Pain Management and his pain medications were adjusted to Oxycontin 80 mg[.] BID, Oxycodone 15 mg. every 4-6 hours PRN, Flexeril, Ibuprofen and Lyrica." (Dec. 3.) Approximately nine days later, the employee went to Mercy Hospital where "a chest CT revealed a small pulmonary embolus" and "tests suggest[ed] aspiration pneumonia presumably related to sedation and suppression of the gag reflex caused by the pain medications."[3] (Dec. 3-4.) The judge also found the employee "had further treatment for pneumonia, that [sic] last of which was in late 2011. He has been weaned off opioids as of September 2012. He never took narcotic pain medications prior to the industrial injury of 2008, and never had any prior treatment for pneumonia." (Dec. 4.) In regard to causal relationship, the judge made the following findings:

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[2] Once again, we observe that the practice of staying conference orders pending appeal "is impermissible under the statute." Pacellini v. Cape Cod Fireplace Shop, 17 Mass. Workers' Comp. Rep. 394, 397 n.4 (2003).

[3] Aspiration pneumonia was not the only theory of causation in this case. In his report, Dr. Swiggard stated, "[c]laimant now maintains that several subsequent episodes of pneumonia are related to the staphylococcal bloodstream infection." (Ex. 4, 1.) At hearing, the employee initially represented he was not pursuing the theory of infection-related pneumonia, (Tr. 11), but later backed away from that stance, stating his position was that "the treatment for his accepted injuries caused his pneumonia," and "I don't think legally we have to prove that it was either the sepsis or the embolism or the opioid. If any or all of those- - some combination of all of those caused his pneumonia, the insurer is on the hook for it, Judge." (Tr. 25-26.) The judge found that, during an April 2010 hospitalization for intractable pain, the employee developed an infection from a catheter inserted in his left hand, and was diagnosed as having "superficial thrombophlebitis and cellulitis." (Dec. 3.) The decision contains no other findings pertaining to the issue of staphylococcal bloodstream infection-related pneumonia. Because the employee has not appealed the decision, the issue is moot.

> I accept and adopt the opinions of the 11A examiner, Dr. William Swiggard. Specifically that the employee's diagnosis of recurrent pneumonia is more probably than not, to a reasonable degree of medical certainty, causally related as an indirect sequella [sic] to the opioid medications he takes for his accepted low back condition (See Depo. Dr. Swiggard, pp. 10, 29, 34, 37, 42). Unfortunately, the doctor expressed some of his opinion with the legally insufficient language of "speculation" (Id. pp. 12, 13, 26). However, a close reading of his comments reveals that his use of the term speculation refers to a lack of certainty, not that his opinion lacks a reasonable degree of medical certainty (Id. pp. 13, 29, 34, 39). Ultimately, the doctor opined that the employee's multiple hospitalizations for pneumonia, including some ER visits, are "most likely" related to sedation with pain medications (Id. p. 42).

(Dec. 4.)

First, the insurer argues the judge erred in finding a causal relationship existed between the employee's pneumonia and the industrial injury. It argues that reversal of the decision and denial and dismissal of the claim is required because Dr. Swiggard's adopted medical opinion was speculative in nature. We disagree.

The employee had the burden of proving that his pneumonia was caused by his use of prescription pain medications for treatment of his accepted back injury. Dr. Swiggard unequivocally opined that there was "one well documented" episode of pneumonia in May of 2010, and that the most probable cause of that illness was aspiration due to suppression of the gag reflex resulting from the opioid medications taken to control the employee's work-related back pain. (Dep. 12, 13, 17, 19, 32, 34-35.) When further questioned by insurer's counsel as to whether he was speculating in this case, Dr. Swiggard replied, "[y]es, most probable. I am judging what the most probable explanation for the observations is. . . . Not the only one by any means." (Dep. 34-35.) "Causality must be shown by a probability and the employee need not exclude all other possibilities." Tassinari's Case, 9 Mass. App. Ct. 683, 686 (1980)(citations omitted); Rodrigues's Case, 296 Mass. 192, 195 (1936). The employee met his burden of proving a causal

relationship existed with regard to the episode of pneumonia he experienced in May of 2010, and the judge did not err by failing to deny and dismiss his claim.

Second, the insurer argues that even if the employee proved the existence of a causal relationship, recommittal for further findings of fact is necessary because 1) the employee failed to submit any medical bills at hearing; 2) Dr. Swiggard's opinions do not support a finding of a causal relationship between all of the claimed treatment and the injury; and, 3) there is no adopted medical opinion indicating which episodes, or particular medical treatments, the insurer is responsible to pay. We agree in part.

Insofar as the insurer now claims the award is barred because the employee failed to submit any medical bills for admission in evidence at hearing, we note the insurer did not argue below that the employee was required to do so in order to receive an order of payment for medical treatment for pneumonia. Indeed, when the employee stated on the record that he was not submitting any medical bills or seeking a dollar amount payable at the hearing, the insurer did not object to going forward with the hearing, or move to dismiss the claim. (Tr. 4.) Rather, the parties agreed that the hearing was going forward on the issue of causal relationship, (Tr. 8), and "treatment for pneumonia on more than one occasion." (Tr. 9.) This issue, raised for the first time on appeal, is waived. Torres v. Pine St. Inn, 9 Mass. Workers' Comp. Rep. 359 (1995)(issue not raised at hearing is waived).

Citing page 42 of Dr. Swiggard's deposition, the judge found, "[u]ltimately, the doctor opined that the employee's multiple hospitalizations for pneumonia, including some ER visits, are 'most likely' related to sedation with pain medications." (Dec. 4.) We agree with the insurer that the judge erred in making this finding because Dr. Swiggard's testimony does not support a causal

relationship between *all* of the claimed treatment and the injury.[4] Although Dr. Swiggard opined that "the most likely explanation for the recurrent pneumonia was sedation because of the pain medications," (Dep. 12), the record also reveals Dr. Swiggard was unable to give a reliable opinion about the number of times the employee actually had pneumonia.[5] He testified, there was "one proven, you know, pneumonia proven by objective diagnostic test," and that "there may have been others but I did not see them." (Dep. 19.) He further testified he received

[4] The employee's medical evidence exceeds ninety pages, consisting of multiple diagnostic tests, notes and reports from various medical providers, hospitals and clinics spanning a timeframe from 2009 through 2012. (Employee Exs. 1-5.)

[5] All objections made during Dr. Swiggard's deposition were overruled by the judge. (Dec. 5.)

> Q: And after our discussion here today, Doctor, is it your opinion that more likely than not Mr. Goodwin's pneumonia was causally related to the back and neck injuries he suffered at work?
>
> Mr. Joseph Buckley: I am going to object. I think that goes beyond the scope of my - - whatever cross it was at this point in time, but you - -
>
> Mr. Steven Buckely: Go ahead, you may answer, Doctor.
>
> A: As I said originally to - - and I do not have dosages, I do not have times or schedules - - to the extent that there was sedation with pain medications, that would be the most likely explanation for recurring pneumonia.
>
> Mr. Steven Buckley: Thank you, Doctor.
>
> Further Recross Examination by Mr. Joseph Buckley:
>
> Q: And you say recurrent pneumonia, but you've only documented one - -
>
> A: There is only one case where there was an imaging result that would support a diagnosis of aspiration pneumonia.
>
> Q: Okay.
>
> A: The fact that they went after an esophagram a year later, you know, without knowing the result of that, it's hard to say, but somebody certainly suspected aspiration at that point in time, enough to do a thousand-dollar test.
>
> Q: It was suspected?
>
> A: Suspected, right, right.
>
> Q: Not confirmed from what you read?
>
> A: Was not confirmed, right.
>
> However, was he on the same medications?
>
> There are many uncertainties.
>
> Q: Okay.

(Dep. 41-43.)

"very limited evidence" and admitted he was speculating regarding the number of times the employee was diagnosed or hospitalized for pneumonia.[6] (Dep. 35.)

The insurer is also correct that the decision contains no adopted medical opinion indicating for which episodes, or particular medical treatments, the insurer is responsible to pay. Because there was conflicting evidence regarding the number of times the employee had recurrent pneumonia, the judge erred by ordering the insurer "to pay any and all causally related medical expenses," without identifying when the employee suffered from work-related pneumonia. Ricardo-Feliz v. Life Care Ctr. of Acton, 26 Mass. Worker's Comp. Rep. 323, 327 (2012)(judge must resolve conflicts in the medical evidence and make findings of fact supporting his conclusions). The employee testified he had seven episodes of pneumonia and four hospitalizations, but provided no specific dates of those alleged illnesses. (Tr. 19.) Dr. Swiggard provided a competent medical opinion supporting only one episode of causally related pneumonia occurring in May of 2010. (Dep. 12-13, 17, 19, 32, 34-35.) Dr. Asha Naidu, an independent medical

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[6] The questioning continued:

> Q: But based on what you have - - and I know that's the most probable, but still, with the limited documents that you had, you'd certainly be speculating, you couldn't say most probable with regard to the number of - -- I think he is claiming that he had numerous hospitalizations and diagnoses with regard to pneumonia, you are speculating certainly with regard to the number of times he was diagnosed - -
>
> A: Yes.
>
> Q: - -or hospitalized with pneumonia, right, Doctor?
>
> A: Absolutely. I am inferring that, and some of those, quote, hospitalizations were clearly emergency room visits.
>
> Q: And so you couldn't say certainly with regard to all of those that they were more probable than not, could you?
>
> A: I got, as I said, very limited evidence.
>
> And, you know, chest x-rays are not absolutely required for the diagnosed clinically, but the stuff I had didn't have hard data in it except for that one occasion.

(Dep. 35-36.)

examiner who examined the employee on behalf of the insurer, opined the employee had two episodes of pneumonia, May 2010 and February 2011. (Ins. Ex. 1, at 4.) Dr. Swiggard testified that the employee's primary care physician reported five episodes of pneumonia,[7] (Dep. 16, 31-32), but with the exception of a December 23, 2011 episode, (Dep. 18), Dr. Swiggard did not identify when those events reportedly occurred. Accordingly, we vacate the order in part[8] and recommit the matter for the judge to resolve the conflicts in the evidence by specifying his findings regarding the number of episodes of recurrent pneumonia, when those incidents occurred, and what treatment appears in the record corresponding to those incidents.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

[7] Dr. Swiggard testified:

> Q: And how many incidents of pneumonia did you note?
>
> A: I was counting things that were referred to in the primary care physician's notes and if we count all those, I came up with five.
>
> Q: But you actually, with the notes, but the actual diagnostic test - -
>
> A: Was done in one – there is only one situation where I received a report that documented true infiltrates in this patient's lungs, right - - in other words, presumptive evidence of real live pneumonia.
>
> Q: All right. So only came up with, based in the record that you show that was supported, one instance of pneumonia, diagnosis of pneumonia per the diagnostic test?
>
> A: Correct.
>
> Q: And when you're talking about five, that's from the primary care physician correct?
>
> A: Yes.
>
> Q: Just notes, right?
>
> A: Just notes.

(Dep. 31-32.)

[8] Consistent with our discussion of the first issue presented on appeal, we affirm the decision regarding the existence of a causal relationship between the work-related injury and the aspiration pneumonia of May 2010.

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Mark D. Horan
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: ***October 8, 2014***