COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 037007-12**

Kenneth Lisby	Employee
EDM Construction, Inc.	Employer
Continental Indemnity Co.	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant and Calliotte)

The case was heard by Administrative Judge Bean.

APPEARANCES
Michael D. Kantrovitz, Esq., for the employee
JoAnn D. Walter, Esq., for the insurer at hearing
Robert S. Martin, Esq. for the insurer on appeal

HARPIN, J. The insurer appeals from a decision awarding the employee § 34A, permanent and total incapacity benefits. We vacate the decision and recommit for further findings on whether the employee's claim is barred by the insurer's affirmative defense of late notice.

The employee Kenneth Lisby (employee) was fifty-eight years old at the time of the hearing, and had worked for EDM Construction Company (employer) since 2005 as a journeyman ironworker. (Dec. 57.) He began having back pain in the 1990s, a condition which was known to the employer when he began working. (Dec. 57, 60.)[1] However, the employee did not seek any medical treatment until 2009, when his primary care physician, Dr. Bruce Watrous, prescribed Vicodin for the pain. (Dec. 60.) The employee continued seeing Dr. Watrous for his back

[1] Jacqueline Magill, the president of the employer, testified she was aware the employee had a "bad back": "He's always claimed that he's had a bad back forever. So I was aware but it was not a new issue." (Dec. 60; Tr. II [October 30, 2015], 50.) Ms. Magill testified that the employee told her he had hurt his back "from when he was an auto mechanic," and that she knew of this in his first year of working for the employer. (Dec. 60; Tr. II, 26-27.)

pain until May 3, 2012. He also saw Dr. Robert Rosenberg, who diagnosed spondylolisthesis and a small L4-5 disc herniation. Id.

On December 6, 2012, after lifting a large beam at work, the employee felt a sharp pain in his back that ran down his left leg to his foot. (Dec. 58.) He stayed at the jobsite for another hour, but did no work. Id. He went home, went to sleep, and woke up in pain. Id. While having breakfast he felt excruciating pain after reaching for a bowl and fell to the floor. Id. The employee called the employer and spoke with Paul Munroe, his supervisor, to tell him he would be in when he could. (Dec. 58; Tr. I [September 29, 2015], 24.) The employee testified that he also told Munroe he believed he had had an injury the day before. (Dec. 58; Tr. I, 24.) The judge did not credit this particular testimony, as he found the employee "did not report the injury as work related to his employer or his doctors (Dec. 58), and further found "[t]he fact that he failed to disclose the accident and injury to his employer and a number of doctors is problematic." (Dec. 67.) The employee did not fill out an injury report for this accident, as "he feared losing his job." (Dec. 68.) The employee was eventually able to get up and came into work late. He did no heavy work that day, and continued working for the next six months on lighter duty, in pain. (Dec. 67.)

The employee had an MRI, which led to a recommendation for surgery, which was performed on February 28, 2013, at the Advanced Spine Surgery Center in Union, New Jersey by Dr. Kaixuan Liu. (Dec. 58; Ex. 20.) At no time did he tell his doctors that he had injured himself at work. Id. The employee tried to go back to work four days after his surgery, but Ms. Magill removed him when she found out he did not have a return-to-work note from his doctor. (Dec. 59; Tr. II, 37-38.) The employee eventually obtained such a note, and then returned to full duty on March 20, 2013, performing lighter work. (Dec. 29; Tr. I, 28; Tr. II, 39.) The employee asked his primary care physician, Dr. Watrous, to certify that

his back injury was work related, but the doctor would not do this, writing instead that the subject matter was outside his area of expertise. (Dec. 59; Ex. 16.)[2]

On July 16, 2013, the employee was at work when his back gave out while he was lifting a 150 pound post. (Dec. 59.) He fractured his left middle finger in that accident, left work, and had not returned to work at least up through the date of the hearing. Id. He began receiving compensation benefits from July 17, 2013, up to June 3, 2014, on which date a $15,000.00 lump sum agreement was approved. Id. The agreement notes that the employee suffered only a finger injury on July 16, 2013, and that the net amount of $12,967.37 represented 8.9 weeks of § 34 benefits, which covered the period from June 4, 2014 to August 9, 2014. Id. The agreement was silent about any back injury on July 16, 2013, as well as any treatment for a back condition after that date. Id.

The employee received treatment for his back condition while he was receiving compensation benefits for the finger injury, and continued to treat after the settlement on June 3, 2014. He had a second back surgery on November 19, 2013, at the Advanced Spine Surgery Center in Union, New Jersey, where Dr. Liu performed a fusion from L-4 through S-1, with the insertion of hardware. (Dec. 59; Exs. 20, 26, 27.) The surgery made the employee's back pain worse. (Dec.

[2] Dr. Watrous wrote,

> He asks that I can certify that his current back pain and disability if [sic] from chronic back problems and further wants me to certify something that is at odds with what is in the EMR. I explained that my area of expertise is not in areas of this type of back pain and those type of assertions can only come from a specialist in that field. He is clearly confused as to why I can not certify his back pain is due to prior work related injury. I have referred him to other orthopedic and neurologists [sic] in order to obtain a second opinion. He finally agrees to do that but is somewhat irratated [sic] that I will not grant him that certification. I will only state that he complains of chronic back pain the etiology of which is unclear and that further evaluation is needed. Other than the back discomfort and mild obesity, he is a very healthy man.

(Ex. 16, report of Dr. Watrous, dated March 29, 2013.)

59.) As of the date of the hearing, the employee described his back pain "as a 9," stated he could not bend, twist or lift, and was not presently treating with any doctor. Id. He lives in California, having moved there in June 2015, when his wife began working there. Id.

The employee filed a claim for compensation on July 18, 2014, alleging a disability that was causally related to a December 6, 2012, industrial accident.[3] (Dec. 65; Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002) [permissible to take judicial notice of Board file].) The insurer filed a Form 104, Notification of Denial, on July 24, 2014, in which it noted in three places, "All Defenses Reserved." Id. It did not check off the box next to "Lack of Notice." (Dec. 65; Rizzo, supra.) A conference on the employee's claim was held on December 4, 2014. The Conference Memorandum, filled out and signed by both parties, noted that the insurer was raising, in addition to other defenses, § 1(7A), "late notice," and "prejudice." Rizzo, supra. The judge denied the claim in an order issued on December 5, 2014. (Dec. 56.) The employee appealed.

A hearing was held on September 29, 2015, and October 30, 2015. (Dec. 56-57.) At the hearing the insurer raised § 1(7A) and "§§ 42 and 44 – late notice and prejudice," among other liability issues, (Dec. 55, 64, 65; Ex. 2), and further argued that the employee's claim had to be dismissed under the doctrine of res judicata, as the employee had not included a back injury claim with his filing and settlement of his finger injury of July 16, 2013. (Dec. 63-64.) The employee sought § 34A benefits from August 10, 2014, and continuing. (Dec. 55; Ex. 1.) He also alleged a bar, pursuant to § 7(1), to the insurer's defenses of §§ 42 and 44,

[3] The judge wrote that "[t]here is no such document in the court's physical file and it was not entered into evidence." (Dec. 65.) The claim and the insurer's Form 104 denial are both contained in the DIA's electronic CMS file. Rizzo, supra. According to that file, the employee's claim was received at the DIA on July 21, 2014, and the insurer's denial on July 24, 2014.

based on its failure to raise those defenses "in the initial case of denial." (Dec. 65; Tr. I, 6.)

In his hearing decision the judge found the employee sustained an industrial accident to his back on December 6, 2012, that he was permanently and totally incapacitated due to that injury from August 10, 2014, and continuing, that while a combination injury did exist in this case under § 1(7A), the major cause of the employee's disability was the December 6, 2012 accident,[4] and that res judicata barred only a claim for a back injury on July 16, 2013. (Dec. 63-69.) The judge also found the insurer's defense of late notice was barred, due to its failure to raise it in a timely manner. (Dec. 65.) The insurer appeals.

The insurer argues the judge erred in finding that res judicata applied only to the July 16, 2013 claim, incorrectly found its late notice defense was waived by its failure to timely raise it, and incorrectly found no prejudice to the insurer.

The judge held that the lump sum settlement of June 3, 2014, barred a claim for a back injury occurring on July 16, 2013, as no such injury was reserved in that agreement. (Dec. 64; Ex. 8.)[5] The insurer agrees that the judge was correct in so

[4] The judge did not specifically cite to any medical expert opinions that the employee's December 6, 2012, back injury remained a major cause of the employee's ongoing disability or need for treatment. Instead the judge relied on the "credible testimony of the employee" and his own review of the medical record to find "a major cause." (Dec. 67.) However, the judge adopted "persuasive medical opinions" of three physicians: Dr. Frank A Graf (the § 11A impartial physician), Dr. Kaixuan Liu, and Dr. Victor Conforti "in finding in favor of the employee." (Dec. 68.) Dr. Graf stated in his deposition that the employee's December 6, 2012, back injury aggravated his pre-existing spondylosis and spondylolisthesis, and this aggravation was a major, though not necessarily predominant, cause of his current disability and need for treatment. (Dep. Dr. Graf, 8.) Dr. Conforti noted in his IME opinion that "[t]he incident of 12/05/12 remains a major, but not necessarily predominant, cause of the current disability, need for treatment, diagnosis, and the restrictions." (Ex. 29, 4.) Schwartz v. Partners Healthcare, 16 Mass. Workers' Comp. Rep. 310, 313 (2002) (where medical opinion evidence satisfies the "a major" causation criterion of § 1(7A), judge's failure to specifically cite to it is harmless).

[5] The judge also found that any claim for a back injury that occurred on July 16, 2013 was waived by the employee, because "he was obligated to file all claims that he had for compensation arising out of that incident." (Dec. 64.) Thus, despite finding that the

ruling, (Insurer's br., 20), but it argues the judge erred in finding the lump sum settlement did not also bar the employee's claim for a December 6, 2012, back injury. The insurer, citing § 48,[6] argues the 2012 injury was not a "separate and distinct injury," but was "inherently linked, as the former caused the weakness that triggered the latter [July 16, 2013 injury]." (Insurer's br., 21.)

The judge was correct, as the insurer noted, that failure to reserve a right to bring a back claim arising out of the same incident *on the same date* covered in the settlement agreement in and of itself bars future litigation on that claim. Duarte v. Trelleborg Sealing Solutions, 28 Mass. Workers' Comp. Rep. 129, 132 (2014); Laroche, supra. Cf. Franklin v. Banner Truck Leasing Co., 14 Mass. Workers' Comp. Rep. 371, 375-375 (2000).

However, the insurer's argument that the lump sum agreement for the 2013 finger injury also bars the claim for the 2012 back injury is raised for the first time

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employee on July 16, 2013, "was lifting a 150 pound post when his back gave out causing the post to fall, crushing his finger[,]" (Dec. 59), the lack of a claim for a back injury on that date barred a later claim under res judicata (claim preclusion). (Dec. 64.) Laroche v. G & F Indus. Inc., 27 Mass. Worker's Comp. Rep. 51, 53 (2013), aff'd Laroche's Case, 84 Mass.App.Ct. 1132(2014)(Memorandum and Order Pursuant to Rule 1:28), citing Heacock v. Heacock, 402 Mass. 21, 23 n. 2(1988)(doctrine of claim preclusion operates to bar further litigation of all matters that were or should have been adjudicated in the prior action if there was a valid, final judgment). A lump sum settlement is analogous to a final judgment. Keegan v. August A. Busch and Co., 18 Mass. Workers' Comp. Rep. 27, 30 (2004).

[6] General Laws c. 152, § 48, provides, in relevant part:

> (4) Whenever a lump sum agreement or payment has been perfected in accordance with the terms of this section, such agreement shall affect only the insurer and the employee who are parties to such lump sum agreement and shall not affect any other action or proceeding arising out of a *separate and distinct injury* under this chapter, whether the injury precedes or arises subsequent to the date of settlement, and whether or not the same insurer is claimed to be liable for such separate and distinct injury.

(Emphasis added. See also § 48[5] containing the same language.)

in this appeal.[7] At no point did the insurer bring to the attention of the judge that it was arguing the 2012 back injury was not a "separate and distinct injury," but instead was linked to the 2013 injury. Nor did the judge ever rule in the decision that the December 6, 2012, injury was not barred by res judicata, as alleged by the insurer. (Insurer's br. 20)[8] Instead, the judge did not consider whether that injury was so barred, because *he was not asked to do so by the insurer*. Having failed to raise the issue before the judge at the time of the hearing, the insurer has waived the issue on appeal. Acquinaga v. Sage Engineering & Contracting, Inc., 32 Mass. Workers' Comp. Rep. ___ (March 26, 2018).

The insurer's second argument concerns late notice, both whether the notice of the 2012 injury to the insurer was made "as soon as practicable" after the injury, G. L. c. 152, § 41,[9] and whether the delay before notice was given was prejudicial to the insurer. The judge found that the insurer's failure to raise the late notice

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[7] In its closing argument the insurer argued only that the employee,

> could have, but patently chose not, to develop and litigate causal relationship of the alleged low back condition to the injury of July 16, 2013. . . The employee testified that he and his former attorney discussed bringing a claim for low back benefits associated with the injury of July 16, 2013. The employee further testified that his attorney made the decision not to pursue the low back.

(Insurer's Closing Argument, 28-29.)

[8] The insurer's counsel at oral argument conceded that the judge made "no determination of the effect of the lump sum on the 2012 injury." (Tr. of O.A., 25.)

[9] General Laws, Chapter 152, § 41, states in relevant part:

> No proceedings for compensation payable under this chapter shall be maintained unless a notice thereof shall have been given to the insurer or insured as soon as practicable after the happening thereof . . .

Although the insurer's hearing memorandum, (Ex. 2.), lists §§ 42 and 44, "late notice and prejudice," its appellate brief lists §§ 41 and 44. (Insurer br. 8.)

defenses of §§ 42 and 44[10] on the Form 104 Denial, "is a bar to raising it at all. § 7(1). There is no newly discovered evidence upon which the insurer can rely to defeat § 7(1)."[11] (Dec. 65). The insurer concedes that it did not raise late notice as

[10] General Laws, Chapter 152, § 42 states:

> The said notice shall be in writing, and shall state in ordinary language the time, place and cause of the injury, and shall be signed by the person injured, or, in case of his death, by his legal representative, or by a person to whom payments may be due under this chapter, or by a person in behalf of any one of them. Any form of written communication signed by a person who may give the notice as above provided, containing the information that the person has been so injured, giving the time, place and cause of the injury, shall be considered a sufficient notice.

General Laws, Chapter 152, § 44 states:

> Such notice shall not be held invalid or insufficient by reason of any inaccuracy in stating the time, place or cause of the injury unless it is shown that it was the intention to mislead and that the insurer was in fact misled thereby. Want of notice shall not bar proceedings, if it be shown that the insurer, insured or agent had knowledge of the injury, or if it is found that the insurer was not prejudiced by such want of notice.

[11] General Laws, Chapter 152, § 7(1) states:

> Within fourteen days of an insurer's receipt of an employer's first report of injury, or an initial written claim for weekly benefits on a form prescribed by the department, whichever is received first, the insurer shall either commence payment of weekly benefits under this chapter or shall notify the division of administration, the employer, and, by certified mail, the employee, of its refusal to commence payment of weekly benefits. The notice shall specify the grounds and factual basis for the refusal to commence payment of said benefits and shall state that if no claim has yet been filed, benefits will not be secured for the alleged injury unless a claim is filed with the department and insurer within any time limits provided under this chapter. *Any grounds and basis for noncompensability specified by the insurer shall, unless based upon newly discovered evidence, be the sole basis of the insurer's defense on the issue of compensability in any subsequent proceeding.* An insurer's inability to defend on any issue shall not relieve an employee of the burden of proving each element of any case. (Emphasis added.)

a defense on its Form 104, but argues that it did reserve "all defenses," and that this vague denial was in response to the employee's vague claim. He described his back injury as coming from only "lifting heavy steel," without listing witnesses or attaching a medical record with a history of a work-related injury. (Insurer's br., 10-11.) However, this "vague claim" was, in fact, sufficient to show time, place and cause of injury, which was all that was required for notice of the injury, albeit quite late. G. L. c. 152, § 42.

The insurer's failure to raise the affirmative defense of late notice on its Form 104 would ordinarily prevent it from raising that defense in the litigation. G. L. c. 152, § 7(1). Doherty v. Union Hospital, 31 Mass. Workers' Comp. Rep. 195, 201 (2017)(§ 41 is an affirmative defense which must be raised before the burden shifts to the employee to prove she complied with the notice . . . requirements.) However, the employee did not raise the bar of § 7(1) to the insurer's late notice defense until the hearing, and then only as an afterthought at the onset of the testimony, having failed to raise it in his hearing memorandum. (Ex. 1; Tr. I, 6.) This was too late, as such a bar had to be raised at the conference, in order for the insurer to have been made aware of it and to have it considered by the judge at that level. Franklin v. Banner Truck Leasing Comp., 14 Mass. Workers' Comp. Rep. 372, 374 (2000), citing Taylor v. Brockton Hosp., 2 Mass. Workers' Comp. Rep. 304, 310 (1988) ("Failure to place §7 in issue causes a claimant to forfeit a powerful ally as he seeks to carry his burden of proving each and every element of his case"). Thus, while both parties failed to follow the proper procedures, we think the employee did have adequate notice at the conference that the insurer was raising the affirmative defense of late notice. By failing to challenge the insurer's defense as untimely until after the hearing had begun, the employee did not give the insurer an adequate opportunity to address the alleged § 7(1) bar. Thus, we hold that, under the particular circumstances of this case, the judge's ruling that the insurer's "failure to raise a defense in a timely manner is a bar to raising it at all[,] §7(1)," (Dec. 65), was error.

Accordingly, the judge should have considered the insurer's affirmative defense of late notice. We therefore recommit the case for him to do so. Wiinikainen v. Epoch Senior Living Inc., 32 Mass. Workers' Comp. Rep. ____ (February 14, 2018)(Failure to consider an issue properly raised requires recommittal for further findings on that issue). The judge must determine whether the notice was given "as soon as practicable" after the injury, G. L. c. 152, § 41, and if not, whether the insurer had knowledge of the injury,[12] or was not prejudiced by the lack of notice. G. L. c. 152, § 44; Hamel v. Kidde Fenwal, Inc., 21 Mass. Workers' Comp. Rep. 127, 130 (2007).

Here, despite finding the insurer's affirmative defense of late notice was barred, the judge proceeded to make findings that the "delay of 19 months [between the 2012 accident and the employee's claim] is excessive, absent a strong reason," (Dec. 65), and "the fact that he failed to disclose the accident and injury to his employer and a number of doctors is problematic." (Dec. 67.) The judge accepted the employee's "excuse that he feared losing his job." (Dec. 67-68.) As we cannot determine whether the judge made the ultimate finding from these facts that the notice was not given "as soon as practicable," on recommittal

[12] The employee asserted that the employer was given actual notice of the 2012 injury, as the judge "addressed what the Insured knew [about the injury] in describing the phone call between the employee and Paul Munroe . . . shortly after 5:30 the following morning." (EE's br. 12.) However, the judge merely noted that "[t]he employee *testified* that he told Munroe about the accident the previous day." (Dec. 58, emphasis added.) We have often stated that mere recitation of testimony without findings adopting or rejecting the statements is error. Griffin v. M.B.T.A., 31 Mass. Workers' Comp Rep. 215, 219 n. 6 (2017). The judge here found only that the employee "testified" to the contact with the employer; he did not find as a fact that the employee had given notice. The judge specifically found that when the employee had back surgery on February 28, 2013 "[h]e still did not report the injury as work related *to his employer* or his doctors." (Dec. 58, emphasis added.) This finding of fact makes it clear the judge did not find actual notice of the 2012 injury to the employer was ever made in a timely manner. However, he did not reach any conclusion on whether the insurer or the employer had *knowledge* of the injury, which he must address on recommittal. Nason, Koziol & Wall, supra, § 15.3 and n. 4.

the judge should reconcile and clarify these findings so we may "determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Praetz v. Factory Mutual Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 46-47 (1993).

Despite finding the insurer's defense of late notice was barred, the judge also found the insurer was not prejudiced by any delay in the employee's notice. He found that:

> the insurer benefitted from the employee's failure to report the injury as work related in that he did not claim and still does not claim, weekly compensation benefits for the time he was out of work in February and March. Also, no doctor has disputed the reasonableness and necessity of the lumbar surgeries, although the outcome has led to some criticism of the doctor. A medical examination in January or February 2013 would not likely have changed the medical course other than to have the surgery take place in Massachusetts.

(Dec. 65-66.) The insurer argues that this finding was error.

Determination whether a delay in providing notice of an injury was prejudicial to the insurer is a matter of fact to be decided by the judge. Berthiaume's Case, 328 Mass. 186, 190 (1951). "The usual forms of prejudice are the inability of the insurer to procure evidence at a time remote from the injury, and the failure of the employee to be treated medically promptly after the injury." Tassone's Case, 330 Mass. 545, 548 (1953). When the injury stems from a series of repetitive incidents or from environmental exposures, the probability of prejudice decreases.[13] When the injury causing the alleged incapacity stems from

[13] Tassone's Case, supra at 548-549 (1953)(dermatitis from working in shoe industry was common condition known to employer and insurer, thus no prejudice because investigation of isolated incident not required); Fantasia v. Borjohn Optical Technologies, Inc., 22 Mass. Worker's Comp. Rep. 131, 134 (2008)(failure of insurer to get prompt examination not prejudicial when injury was employee's exposure over time to beryllium particles, as employee's condition was progressive and all medical records were available to insurer), aff'd Fantasia's Case, 75 Mass.App.Ct.655 (2009); Ford v. O'Connor Constructors, Inc., 23 Mass. Workers' Comp. Rep. 145 (2009)(known and obvious hazards from fumes and ash of boilermaker job negated insurer's argument that it was

a single incident, the probability of prejudice to the insurer increases. See Booth's Case, 289 Mass. 322, 325 (1935)(failure to give notice of hernia until six months after lifting of heavy copper roll was prejudicial to insurer's entitlement to examination of employee "as early opportunity as practicable").

In the present case there was a specific date of injury, December 6, 2012, and a specific injury to the employee's back. The employee had surgery on February 28, 2013 and November 19, 2013, and did not file a claim until nineteen months after the date of injury, July 18, 2014, which the insurer contends was the first time it knew of the injury. If the insurer's contentions as to notice are accepted, the facts are congruent with those in Hamel, supra, where the employee suffered a left knee injury, followed by surgery to the knee five weeks later.[14]

The judge in the present case held that the insurer's allegations of prejudice

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prejudiced from inability to obtain its own medical examination until years after employee left work); cf. Fredyma v. AT&T Network Systems, 11 Mass. Workers' Comp. Rep. 420, 436(1997) (hypersensitivity from exposure to fluorescent lighting and other occupational exposures not common to industry, thus findings on prejudice to self-insurer must be made, not conclusory statement of no prejudice).

[14] The insurer in Hamel, supra, did not have notice of the condition until seven months after the injury, when the employee's short term disability benefits exhausted. We held that in those circumstances,

> Because the employee had surgery on his left knee some five months prior to filing his compensation claim, the insurer could not exercise "its statutory right to obtain contemporary expert medical testimony as to whether or not the employee was disabled" due to the alleged work injury, rather than his pre-existing condition. (Citations omitted.) The same scenario afflicts the insurer's ability to determine the reasonableness, necessity and causal relationship of what was an already accomplished left knee surgery. It is too facile to suggest, as the employee does, that the insurer's access to medical and hospital reports contemporaneous to the surgery negates any prejudice to the insurer. When, as here, an insurer is forever deprived of its right under § 45 to have the employee physically examined by its medical expert *before* surgery takes place, a strong argument can be made that prejudice attaches.

Hamel, at 133 (emphasis in original).

in not being able to conduct a contemporaneous investigation, obtain its own doctor's opinion "with a near in time physical examination," and being unable to object to out-of-state surgeries by a surgeon unknown to the insurer, were "offset" by other factors. Those included the insurer's benefiting from the employee's failure to report the injury, as the employee did not seek benefits for the time he was out of work in February and March of 2013, that all the doctors did not dispute the reasonableness and necessity of the lumbar surgeries, and that "a medical examination in January or February 2013 would not likely have changed the medical course other than that the surgery take place in Massachusetts." (Dec. 65-66.)

The analysis used by the judge—that the claimed prejudice to the insurer is somehow "offset" by gains it realized—is incorrect. Rather, the judge should determine, as a factual matter, whether the insurer was prejudiced, taking into account the usual factors outlined in Tassone's Case, supra. We have never held that one of the factors to consider is whether the insurer has the opportunity to object to out-of-state surgeries or unknown surgeons. On the other hand, the fact that none of the doctors disputed the reasonableness and necessity of the surgeries, is an appropriate factor to consider, because it goes to whether the insurer was prejudiced by not being able to obtain a contemporaneous medical opinion, or by the employee's lack of prompt treatment. Although we held in Hamel that when a condition is surgically repaired long before notice of the injury is given to the employer or insurer, "a strong argument" may exist that prejudice to the insurer is present, the mere occurrence of such a surgery or surgeries is not dispositive. As the Supreme Judicial Court noted in Thibeault's Case, 341 Mass. 647, 652 (1935), and cited in Hamel, supra at 133, "[i]t may be . . . that the [judge] drew from the evidence permissible inferences of absence of prejudice which he has not adequately expressed in subsidiary findings." Therefore, we recommit the decision for further findings on whether notice was given "as soon as practicable" and, if not, whether the employee met his burden of proof to show the employer,

its agent, or the insurer had knowledge of the injury, or that the insurer did not suffer prejudice due to late notice of the injury.

So ordered.

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William C. Harpin
Administrative Law Judge

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Bernard F. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **October 12, 2018**