COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 036400-11**

Lilliane Cummings	Employee
City of Pittsfield	Employer
City of Pittsfield	Self-Insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Horan and Harpin)

The case was heard by Administrative Judge Poulter.

APPEARANCES
Marnie A. Sommer, Esq., for the employee
Frederica H. McCarthy, Esq., for the self-insurer

CALLIOTTE, J. The employee appeals from a decision denying her claim, pursuant to G. L. c. 152, §§ 13 and 30, for dental treatment, including a dental prosthesis. Because the judge made inconsistent and contradictory findings, we recommit the case for further findings of fact.

The employee, age fifty-seven at the time of hearing, is a paraprofessional who works with autistic children. The parties stipulated that an industrial accident occurred on July 20, 2011, when a child she was holding in her lap hit her in the face with his head. (Dec. 3.) Following a conference, the judge denied the employee's claim for medical benefits. At hearing, the insurer raised § 1(7A) as an affirmative defense.[1] The issue at hearing was the extent to which the work incident caused damage to the

[1] General Laws, c. 152, § 1(7A), provides, in pertinent part:

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

employee's teeth, which in turn required treatment, including an eight-tooth prosthesis, otherwise known as a bridge. (Dec. 3.)

Prior to the accident, the employee was diagnosed with chronic adult periodontitis,[2] had undergone several root canals, and was missing ten teeth. She had a five-tooth bridge running behind her two upper front teeth (numbers 8 and 9), to secure false tooth number 7. (Dec. 4; Dep. 7; see Ex. 4 for identification, photo of standard tooth numbering.) On July 21, 2011, the day after the head-butting incident, the employee went to the employer's Occupational Medicine Services, filled out an accident report, and underwent x-rays. [3] She was told to make an appointment with her dentist. (Dec. 3.)

The employee's first dental appointment after visiting Occupational Medicine was on November 21, 2011, with Dr. J. Patrick Carsell.[4] Id. The employee testified that her two front teeth, numbers 8 and 9, were struck at the time of the accident, and began to crumble two weeks later. (Dec. 4.) She testified that she told Dr. Carsell at the November 21, 2011, appointment that she "had gotten hit at work," and her teeth were still bothering her. (Dec. 4; Tr. 60.) By the time she saw Dr. Carsell, she said, her teeth were cracked, and her gums were torn from the impact of the work injury. (Dec. 4; Tr.

[2] Dr. Carsell testified that periodontitis is an infection of the gum and bone around the tooth, and that it was prevalent mostly in the lower arch of the employee's teeth. (Dep. 35-36.)

[3] The Occupational Medicine report of July 21, 2011 indicated the employee complained of pain throughout her mouth and jaw, denied bleeding, or loose or broken teeth, but was worried her teeth were loose. Examination revealed no loose teeth, but tenderness in her gums and teeth. (Ex. 5-6, Occupational Medicine Services report, 7/21/11). No x-rays were submitted as part of the Occupational Medicine Services notes.

[4] With respect to the delay in treatment, the employee testified that she did not think her two front teeth (numbers 8 and 9) were enough of a problem to require emergency treatment. She also stated that, after the work incident, she tried for six weeks, without success, to make an appointment with Dr. Cutler, her regular dentist, despite the fact that she had a previously scheduled appointment a week after the head-butting incident with Dr. Carsell, who had extracted a molar at some earlier time. She did not recall seeing Dr. Carsell in July after the injury. After learning that Dr. Cutler had retired, she made an appointment with Dr. Carsell for November 21, 2011. (Dec. 3-4; Tr. 12-14, 58-60.)

14, 50.) According to the employee, one of her front teeth, tooth number 9, broke off completely when Dr. Carsell took out the old bridge. (Dec. 4; Tr. 50-51.)

The judge credited the employee's testimony "with regard to the accident, her follow-up care on July 21, 2011, and her timely filing of the report of the injury." (Dec. 4.) However, she did not find the employee to be "a credible historian with regard to her dental care, dental history and her attempts to secure treatment in 2011 and 2012." Id.

Because there were no dentists on the Department's roster of impartial physicians, the parties agreed to allow the submission of medical records from the employee's treating dentist and medical providers after the accident, as well as the report of Dr. Kevin Coughlin, a dentist engaged by the self-insurer. The parties deposed Dr. Carsell on June 6, 2013. (Dec. 1, 2.)

Dr. Carsell testified that, sometime between November 21, 2011 and January 17, 2012, he knew about the work injury, but made no reference to work trauma or to tooth number 9 crumbling in the November 21, 2011, appointment note, possibly because he forgot. (Dec. 5; Dep. 42-43.) When he saw the employee on that date, he thought tooth number 9 could be treated conservatively. When he saw her on January 17, 2012, she told him her number 9 tooth had broken. He testified it did not break while he was removing the old bridge. (Dec. 5; Dep. 38-39.) On February 23, 2012, he was of the opinion that "the existing bridge was still in place, but she had suffered some damage and some breakage to her 2 central incisors #8 and #9." (Dec. 5; Dep. 12-15.) Moreover, "the damage to #8 and #9 resulted in the need for an expanded bridge," and "was likely the result of the reported head-butt in July 2011." (Dec. 5; see Dep. 53.) Further, the "damage to teeth #8 and #9 was *the major cause* of the need to replace the initial prosthesis (bridge) with [an] expanded 8 tooth prosthesis." (Dec. 5 [emphasis added]).[5] This bridge replacement plan was reasonable. (Dec. 5; Dep. 24.)

The judge "credit[ed] and adopt[ed]" Dr. Carsell's opinion, as she outlined it. (Dec. 5.) In the next paragraph, she again stated, "I adopt Dr. Carsell's opinion."

[5] Dr. Carsell actually opined the damage to teeth numbers 8 and 9 was "a major cause" of the need to replace the old prosthesis. (Dep. 19.)

However, in the next sentence, she found, "Dr. Carsell was unclear as to the relationship between the work accident and the need for an eight tooth prosthesis." Id. She also found Dr. Carsell acknowledged that the broken number 9 tooth "*could* be related to a head butt," but that he did not have "contemporary notes to that effect." (Dec. 6; emphasis added.) She held that either his notes were incomplete, or he was not told about the work injury until January 17, 2011. Further, the judge found, "the employee is not a credible historian and without corroborating contemporaneous medical records and or testimony, there is no way to connect the accepted accident with the need for the required prosthesis." Id. She concluded by finding that Dr. Carsell "did not relate the combination of the pre-existing bridge and damage to tooth #7 to the need for the removal of #8 and #9 to form a major . . . need for the requested prosthesis. There is no credible testimony other than a vague recollection by Dr. Carsell that the damage to #9 is related to the work injury." Id.

The employee argues that the decision should be reversed or, in the alternative, remanded, because the judge's findings are arbitrary and capricious insofar as she adopted Dr. Carsell's opinion the work injury was "a major cause" of the employee's work injury and need for a new bridge, while simultaneously finding there is no competent medical evidence supporting the claim. (Employee br. 5-7; OA Tr. 5, 7.) After initially arguing that there was ample evidence to support the judge's decision, the insurer ultimately agreed the decision is inherently inconsistent, and concedes it should be remanded for clarification. (OA Tr. 11, 20, 21, 28.) We agree that recommittal is appropriate.

The issue before the judge was whether the head-butting incident, which was undisputed, caused the damage to the employee's teeth which resulted in the need for treatment, including an expanded eight-tooth bridge. This was a medical question requiring expert medical testimony. Josi's Case, 324 Mass. 415, 418 (1949). Here, we cannot tell whether the judge actually adopted Dr. Carsell's opinion, or not, nor can we understand her findings regarding causal relationship. The judge wrote that she credited and adopted Dr. Carsell's opinion on causation, which included his statement that the

damage to teeth numbers 8 and 9 was likely the result of the head butt. (Dec. 5.) However, she also found "no credible testimony other than a vague recollection by Dr. Carsell that the damage to #9 is related to the work injury." (Dec. 6.) These findings are clearly inconsistent and cannot stand. See King v. City of Newton, 29 Mass. Workers' Comp. Rep. 13, 18 (2015)(internally inconsistent decision cannot stand). The judge must decide whether she adopts all, part or none of Dr. Carsell's opinion, see Gurey v. Tables of Content, 27 Mass. Workers' Comp. Rep. 173, 175 (2013), and make clear findings to that effect. [6]

On recommittal, the judge must also perform a § 1(7A) analysis as described in Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep.50 (2005). The first step in this analysis is to determine whether the insurer has met its burden of producing evidence of a pre-existing condition which combines with the compensable injury to cause or prolong the employee's disability or need for treatment. See MacDonald's Case, 73 Mass. App. Ct. 657, 658 (2009). Although the employee clearly had pre-existing dental problems, the judge has failed to cite medical evidence indicating what, if any, pre-existing condition combined with the work injury to cause the need for the expanded bridge. If she determines the insurer has not met its burden of production on those issues, then the simple "as is" causation standard applies. If she finds the insurer has met its

[6] The judge, of course, need not adopt Dr. Carsell's opinion. Her citation to Brommage's Case, 75 Mass. App. Ct. 825 (2009), suggests she may have intended to reject his opinion for the reasons stated in that case. See Brommage, supra (judge properly declined to adopt impartial examiner's conclusions which were based on same facts judge discredited). If that was her intention, her statement that she does not find the employee to be "a credible historian with regard to her dental care, dental history and her attempts to secure treatment in 2011 and 2012" (Dec. 4), is too vague to allow us to tell what those facts are and whether they are relevant to causation. We cannot "look at the judge's subsidiary findings of fact and clearly understand the logic behind [her] ultimate conclusion." Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993). In addition, the judge's concern that, without contemporaneous medical records discussing the injury, there is "no way to connect the accepted accident with the need for the required prosthesis," (Dec. 6), is misplaced. Even without contemporaneous records, the judge may properly adopt a medical opinion finding causal relationship. See, e.g., Sullivan v. St. Joseph's Parish, 21 Mass. Workers' Comp. Rep. 263, 267 (2007)(employees often not good historians). Here, there are records from Occupational Health Services as of the day after the accepted accident; thus, the judge's concern appears to be about Dr. Carsell's initial failure to mention the accident, the occurrence of which is not disputed.

initial burden, the burden shifts to the employee to prove, first, the compensable nature of the pre-existing condition. Barring such proof, the judge must then determine whether the employee has met her burden of proving whether the work injury remains "a major cause" of the need for the expanded bridge.[7] We do not understand the meaning of the judge's finding that Dr. Carsell "did not relate the combination of the pre-existing bridge and damage to tooth #7 to the need for the removal of #8 and #9 to form a major if not predominant need for the requested prosthesis." (Dec. 6.) The judge must address the relevant § 1(7A) factors with more precision. As we have often stated, we should be able "to determine with reasonable certainly whether correct rules of law have been applied to facts that could be properly found." Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 46-47 (1993). As the decision stands, we cannot do that.

Accordingly, we vacate the decision and recommit the case to the judge to reconsider the evidence and make further findings consistent with this opinion. Because the employee prevailed in part on this appeal, an attorney's fee may be appropriate under § 13A(7). Employee's counsel must submit to this board, for review, a duly executed fee agreement between the employee and counsel. No fee shall be due and collected from the employee unless and until the fee agreement is reviewed and approved by this board.

So ordered.

[7] Dr. Carsell's opinion, as recounted and initially adopted by the judge, was that the head butt was the likely cause of the damage to the employee's two front teeth, #8 and #9, and the damage to those teeth was a major cause of the need for the expanded prosthesis. If the judge adopts Dr. Carsell's opinion and finds evidence of a combining, non-compensable pre-existing condition, the judge must then determine whether Dr. Carsell's opinion, taken as a whole, satisfies the "a major cause" standard. See Stawiecki v. DPW Highway Dep't, 26 Mass. Workers' Comp. Rep. 31, 33 (2012)(testimony of medical expert should be considered as a whole). We note that, although not specifically cited by the judge, Dr. Carsell gave a clear "a major cause" opinion in writing: "It is my opinion that the injury that Ms. Cummings suffered on July 20, 2011, during the course of her employment is a major, though not necessarily predominant contributing cause to the need for the dental treatment as set forth in the treatment plan of October 2, 2012." (Ex. 5-6, Dr. Carsell's November 13, 2012, response/addendum to a November 7, 2012 letter from employee's attorney.)

Carol Calliotte
Administrative Law Judge

Mark D. Horan
Administrative Law Judge

William C. Harpin
Administrative Law Judge

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