COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 009543-10**

Loretta R. King	Employee
City of Newton	Employer
City of Newton	Self-Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Harpin)

The case was heard by Administrative Judge Herlihy.

APPEARANCES
Michael D. Kantrovitz, Esq., for the employee
Mary Ann Calnan, Esq., for the self-insurer

KOZIOL, J. The self-insurer appeals from a decision ordering it to pay the employee § 34A permanent and total incapacity benefits, § 36(1)(k) bodily disfigurement benefits in the amount of $15,000.00, and § 30 "reasonable and necessary medical expenses including but not limited to [a] motorized chair lift,"[1] which were found to be causally related to the employee's April 28, 2010, work injury. The self-insurer argues the judge erred by 1) making internally inconsistent findings; 2) mischaracterizing and then adopting alleged opinions of the § 11A examiner; 3) finding that the additional medical evidence was sufficient to overcome the impartial medical examiner's opinions; 4) failing to conduct a proper analysis under § 1(7A); and, 5) failing to provide an adequate analysis of the employee's earning capacity consistent with § 35D.

[1] "Although commonly used, the statutory support for the 'reasonable and necessary' standard is nonexistent." Donovan v. Keyspan Energy Delivery, 22 Mass. Workers' Comp. Rep. 337, 337 n.1 (2008); Lewin v. Danvers Butchery, Inc., 13 Mass. Workers' Comp. Rep. 18, 19-20 n.1 (1999)(" '[a]dequate and reasonable' relates to the nature of the hospital or medical services," whereas " '[n]ecessary' relates to the length of time an employee may be entitled to such health care services. It was added to the statute in 1948 when the duration of medical benefits was expanded to an indefinite period from what had earlier been limited to a few weeks").

The self-insurer's first two claims of error require us to vacate the decision and recommit the case for further findings of fact. We also briefly address the self-insurer's third claim of error because it is the foundation for the contention that denial and dismissal of the employee's claim is the appropriate disposition, rather than recommittal for further findings of fact. We do not address the self-insurer's fourth and fifth claims of error, as the judge's further findings of fact may require her to revisit these issues on recommittal. See, Buckley v. Boston Edison, 28 Mass. Workers' Comp. Rep. ___ (05/05/2014) (where erroneous findings and conclusions may have influenced judge's rulings on other issues, reviewing board will not examine issues that may be subject to revision on recommittal).

The employee, age sixty-two at hearing, worked for the City of Newton school system where she performed "cooking preparation and food distribution to students." (Dec. 6.) On April 28, 2010, the employee was clearing tables when she slipped and fell, hitting a table and injuring her right leg. The employee received treatment from the school nurse, who applied ice to her swollen right leg. (Dec. 7.) When she returned to work the following day, using a borrowed cane for ambulation, her supervisor instructed her to seek medical treatment. (Dec. 7.) On April 30, 2010, the employee received treatment at the Newton Wellesley Hospital, where she was diagnosed as suffering from a sprained ankle[2] and contusions of the right knee and left lower ribs. (Dec. 7.) Shortly thereafter, the self-insurer began paying the employee temporary total incapacity benefits. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file).

On August 19, 2011, the self-insurer filed a complaint to discontinue those benefits based on a June 28, 2011 report of its examining physician, Dr. Kenneth

[2] The exhibit and the judge's decision state that the diagnosis was left ankle sprain. (Ex. 7; Dec. 7.) However, the balance of the medical record from the Newton Wellesley Hospital indicates that the employee complained of right ankle pain, (Ex. 7), and the remainder of the judge's decision discusses only right ankle symptoms.

Glazier. Id. The self-insurer's complaint was the subject of a conference conducted before a different administrative judge. That judge allowed the employee's motion to join a claim for a motorized chair lift, ordered the self-insurer to pay for that device, and denied the self-insurer's complaint to discontinue the employee's weekly benefits. (Dec. 4.) The self-insurer appealed, and on December 17, 2012, the employee was examined by the § 11A impartial medical examiner, Dr. William D. Shea. On May 30, 2013, the conference judge allowed the employee's motion to join a claim for § 36 benefits. (Dec. 4; Tr. I, 4.) Thereafter, the matter was transferred to the present administrative judge.

On the date of the hearing, October 22, 2013,[3] the judge allowed the employee's motion to join a claim seeking § 34A benefits from June 4, 2013, and continuing. (Tr. I, 4.) The self-insurer pursued its complaint to discontinue benefits, raising the defenses of disability and the extent thereof, causal relationship, and § 1(7A).[4] (Tr. I, 6.) At the beginning of the hearing, the judge noted that the self-insurer previously filed a motion requesting a finding of inadequacy regarding Dr. Shea's report, and that she allowed the motion, finding the report to be inadequate and allowing the filing of additional medical evidence. (Tr. I, 8.) The judge also ruled that the self-insurer met its burden of production under § 1(7A) with regard to the employee's pre-existing diabetic condition. (Tr. I, 8; Dec. 8, 9, 10, 12.) The parties submitted a number of joint medical exhibits, and the self-insurer submitted the report of Dr. Glazier. (Ex. 7-14, 20; Dec. 2-3.)

[3] Hereinafter, the hearing transcript from October 22, 2013 is referred to as Tr. I. The hearing was continued to January 15, 2014, but on that date the parties discussed only housekeeping matters such as setting the date for the close of the evidence. Tr. II.

[4] General Laws c. 152, § 1(7A), provides, in relevant 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.

The parties also submitted the deposition testimonies of Dr. Shea and of Dr. Glazier. (Dec. 5.)

On appeal, the self-insurer's first two arguments challenge the judge's findings regarding Dr. Shea's opinions on the issue of causation. First, the self-insurer asserts the judge made internally inconsistent findings regarding Dr. Shea's opinions pertaining to the issue of causation. Second, the self-insurer argues the judge further erred by misstating Dr. Shea's opinions and relying on those misstated opinions to conclude that the employee was entitled to further weekly incapacity benefits and the § 36 award. We agree.

The judge found that Dr. Shea

> was unsure as to the employee's diagnosis but was sure that the employee's condition did not represent any form of Achilles tendonitis of the right ankle. He did not find any swelling in the employee's ankle and found the Achilles tendon to be intact. He further noted that the employee's cane was ill fitting. (Ex. 4[.]) Dr. Shea did opine that the chairlift was reasonable. (Shea Depo. at 9[.])
>
> Dr. Shea opined that the employee's complaints of the right leg were related to the work injury of April 2010 but there was no diagnosis that could explain why she did not get better from the fall. (Id. at 16). Dr. Shea found no evidence of any residual of a stroke. (Id. at 15[.]) Despite valiant attempts from the employee counsel Dr. Shea ultimately opined that the diabetic condition brings huge complications however whatever the employee had happen to her on the fall should have been much better when it happened in 2010. [sic] (Id. at 19, 21[.]) Dr. Shea also noted that the employee improperly used a cane and the elbow was bent and found those observations to be red herrings. In the end Dr. Shea stated "I'm no help in this at all basically." (Id. at 20[.])

(Dec. 8.) Despite these findings of fact, which are supported by the evidentiary record cited by the judge, the judge made the following findings contained under the "Causal Relationship" heading of her "Rulings of Law:"

> The medical evidence does support that the employee suffers from diabetes. There is no evidence that this condition arose out of or in the course of her employment. The preexisting condition, diabetes, is therefore not compensable. All the medical experts agree that the employee did

> sustain an injury to her right ankle and the employee's diabetic condition makes her a poor surgical candidate. She is limited in her ability to stand and walk. I adopt the opinions of Drs. Shea and Gorson that the employee's biggest problem continued to be a well-documented partial tear of the right Achilles tendon. (Exhibit 4 & 13[.]) It is the partial torn Achilles tendon combined with the employee's underlying diabetic condition that prolongs her disability.

(Dec. 11-12.) In regard to the employee's claim for § 36 benefits, the judge made the following findings and ruling:

> I hereby adopt the opinions of Dr. Shea and Gorson and find that the employee's biggest problem continued to be a well-documented partial tear of the right Achilles tendon."[sic] (Exhibits 4 & 13[.]) In finding that the employee's right ankle injury to be compensable [sic] and that said injury was a major but not necessarily predominant cause of her present disability I hereby award the employee s. 36 benefits.

(Dec. 12.) The findings that Dr. Shea "did not find any swelling in the employee's ankle and found the Achilles tendon to be intact" and that "there was no diagnosis that could explain why she did not get better from the fall," (Dec. 8), are at odds with the finding that he recognized the employee continues to suffer from "a well-documented partial tear of the right Achilles tendon." (Dec. 12.) As such, the findings regarding Dr. Shea's opinions on the threshold issues of the nature of the employee's injury and causal relationship are internally inconsistent. "Internally inconsistent findings which go to the heart of the issue presented are arbitrary, and cannot stand." Cruz v. Corporate Design Co., 9 Mass. Workers' Comp. Rep. 618, 621 (1995).

In addition, the judge's findings, appearing in her rulings of law, that Dr. Shea opined "the employee's biggest problem continued to be a well-documented partial tear of the right Achilles tendon," misstated his opinion. (Dec. 12.) When asked if he disagreed with the two radiologists who interpreted the employee's 2010 MRIs as having either a strain or a partial tear of the Achilles tendon, Dr. Shea testified, "[y]eah. I don't think it was a partial tear. I think something happened. She had some swelling in those places in her ankle, but they are

nondiagnostic, but they were real. Those things were real in December and June of 2010." (Dep. 21.)

When asked if the issue with the employee's Achilles tendon had resolved by the time he saw the employee in December of 2012, Dr. Shea testified:

> A: Yeah. I guess that's fair to say. I can only state the facts, that the MRIs of the 2010 showed a little bit of an abnormality, nothing that was going to draw any attention to; in fact, nothing that would get you really excited about having to do anything.
>
> And in 2012, I didn't have any MRIs. I just had the physical exam, and that was unremarkable.
>
> Q: In your mind, that was normal?
>
> A: Yes.

(Dep. 13.) Dr. Shea did not waver in his opinion that when he examined the employee in 2012, her right ankle was normal. (Dep. 13, 21.)

Thus, Dr. Shea's opinions actually conflicted with Dr. Gorson's opinions. Nonetheless, the judge relied in part on her own misstatement of Dr. Shea's opinions to conclude that the employee continued to suffer from a work-related, partial tear of the right Achilles tendon. Where a judge adopts conflicting medical opinions, the resulting findings are internally inconsistent and the decision cannot stand. Cadigan v. M.W.R.A., 10 Mass. Workers' Comp. Rep. 844, 845-846 (1996). Because we cannot say that the error in adopting inconsistent medical opinions was harmless as a matter of law, we must recommit the matter for the judge to reconsider the medical evidence and make further findings of fact. Sourdiffe v. University of Mass./Amherst, 22 Mass. Workers' Comp. Rep 319, 324-325 (2008) (adoption of inconsistent medical opinions requires recommittal for further findings).

The judge further relied on "the opinion of Drs. Shea, Vandor and Morley" to conclude the self-insurer was responsible for payment of the motorized chair lift. (Dec. 12.) To the extent the judge implicitly relied on her prior conclusion

that Dr. Shea provided the necessary statement of causal relationship, her conclusion regarding the self-insurer's responsibility to pay for the motorized chair lift suffers from the same infirmity as her conclusions regarding the employee's entitlement to §§ 34A and 36(1)(k) benefits.

Lastly, we disagree with the self-insurer's argument that the decision must be reversed and the employee's claims must be denied and dismissed. The self-insurer's assertion rests on its claim that the remaining medical evidence is insufficient to overcome the prima facie effect of Dr. Shea's opinion on causal relationship.[5] Because the judge's decision shows that she thought Dr. Shea's opinions were consistent with Dr. Gorson's, she did not have the opportunity to weigh the evidence to determine whether Dr. Shea's opinion was met and overcome by conflicting evidence. By asking us to make such a ruling, the self-insurer is asking us to weigh the evidence, a task we do not undertake, as it is within the sole province of the administrative judge. Sullivan v. Centrus Premier Home Care, 26 Mass. Workers' Comp. Rep. 301, 308 (2012)(determining the weight of evidence is "exclusively the judge's responsibility"). On recommittal,

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[5] The self-insurer points out in its brief, (Self-ins. br. 17-18), that Dr. Shea's causal relationship opinion is legally insufficient to support an award of any benefits as it rests on the existence of a temporal relationship only. Ciano v. Peterson Party Ctr., 23 Mass. Workers' Comp. Rep. 101, 103 (2009)(physician opinion based on temporal relationship insufficient to support finding of causal relationship).

Dr. Shea explained:

> Q: So there's a temporal relationship?
>
> A: That's right
>
> Q: Okay.
>
> A: Something happened and she's still not working.
>
> Q: Alright. But it's not medically explained by what happened to her in April of 2010?
>
> A: In my eyes, no.

(Dep. 17.)

the self-insurer is free to bring this and its remaining arguments to the attention of the administrative judge. Lafleur v. M.C.I. Shirley, 24 Mass Workers' Comp Rep. 301, 305 (2010).

Accordingly, we vacate the decision and recommit the case for further findings of fact and rulings of law consistent with this decision.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

_____
Bernard W. Fabricant
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

Filed: **February 13, 2015**