COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 007702-09**

Maria Kiaresh	Employee
Hasbro Incorporated	Employer
Hasbro Incorporated	Self-Insurer

REVIEWING BOARD DECISION
(Judges Horan, Fabricant and Calliotte)

The case was heard by Administrative Judge Poulter.

APPEARANCES
Charles R. Casartello, Jr., Esq., for the employee
Frederica H. McCarthy, Esq., for the self-insurer

HORAN, J. The self-insurer appeals from a decision awarding the employee permanent and total incapacity benefits from April 17, 2012, to date and continuing. We affirm the decision.

The employee, fifty-seven years old at the time of hearing, emigrated from Italy to the United States at age thirteen. She did not attend high school, cannot read or write English, and testified through an interpreter at the hearing. She is right-handed. (Dec. 3.) On May 17, 2005, while performing repetitive work on an assembly line, she experienced right shoulder pain while "flattening bags of game chips to put into boxes. . . ." (Dec. 3-4; Tr. 17.) She treated with the company nurse and physician. (Dec. 4.) In 2008, she underwent neck surgery; in 2010, surgery on her right shoulder was performed. (Dec. 4.) She was laid off in 2008 "due to her work restrictions from her industrial injury in 2005." (Dec. 3.) The self-insurer accepted her claim and commenced payment of weekly benefits.[1]

[1] At hearing, the parties stipulated "that the injuries incurred by the Employee on May 17, 2005 arose out of and in the course of her employment." (Dec. 3.) The self-insurer's Form 103, evincing its acceptance of the claim, was filed with the board on April 17, 2009; the employee's injury is described as "right neck/shoulder pain related to working assembly line."

On June 23, 2011, the self-insurer filed a complaint to discontinue or modify the employee's benefits. Prior to the conference, the employee moved to join her claim for § 34A benefits, which was allowed. (Dec. 2.) In a conference order dated February 16, 2012, the judge denied the self-insurer's complaint, and did not address the employee's claim. Both parties appealed, but the self-insurer withdrew its appeal on October 23, 2012, leaving the employee's § 34A claim to be adjudicated at hearing. (Dec. 1-2, Tr. 4-5.)

On April 18, 2012, pursuant to § 11A, the employee was examined by Dr. Alan Bullock. The employee required the assistance of an interpreter at the examination. (Dep. 6.) Dr. Bullock's May 3, 2012 report of that examination was admitted into evidence at the October 24, 2012 hearing. (Stat. Ex. 1.)

At hearing, the self-insurer denied the employee's disability and the extent of her incapacity.[2] (Dec. 2; Tr. 5, 9.) The self-insurer did not defend on causal relationship grounds.[3] The employee testified about the repetitive nature of her work, the May 17, 2005, accident, her surgeries, and her symptoms and limitations related to her right shoulder, arm and hand. She also testified her pain medication made her drowsy. (Dec. 1, 3-4.)

On November 30, 2012, five weeks after the hearing, Dr. Bullock was deposed; the transcript of his deposition testimony was admitted into evidence. (Dec. 2.) Following Dr. Bullock's deposition, the self-insurer filed a motion, opposed by

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[2] The judge framed the issues at hearing:

> Judge: The insurer is denying disability and the extent of incapacity.
> Is that a complete recitation of the issues on both sides this morning?
> Ms. McCarthy: Yes, your Honor.

(Tr. 5.)

[3] Accordingly, the employee had the burden of proof only on the issues of disability and the extent of her incapacity. Ginley's Case, 244 Mass. 346, 348 (1923)("if not conceded by the insurer, evidence must be introduced which satisfies the statutory requirements and warrants an award" of compensation).

the employee,[4] requesting leave to introduce additional medical evidence on inadequacy grounds. See G. L. c. 152, § 11A(2). In its motion, the self-insurer argued Dr. Bullock's opinion was "inadequate as to the issues of causal relationship, on-going disability and major cause."[5] (Self-ins. Motion, 12/14/12.) The parties agree that on January 14, 2013, they argued the motion before the judge. Unfortunately, the motion session was conducted off the record.[6] The hearing decision indicates the judge denied the motion that day.[7]

In her decision, the judge noted the May, 2005, industrial accident and also acknowledged the employee's work for the self-insurer was repetitive in nature. (Dec. 3-5.) The judge credited the employee's testimony regarding her pain, limitations, and the soporific effect of her pain medications. (Dec. 4.) She also adopted Dr. Bullock's opinion that the employee was permanently partially disabled, restricted from repetitive work involving the neck and shoulder, and thus restricted from lifting in excess of ten pounds. (Dec. 4-5.) These findings, combined with the judge's consideration of the employee's age, lack of education, and poor English, led her to conclude the employee was permanently and totally incapacitated. (Dec. 5-6.)

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[4] We take judicial notice of documents in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

[5] In response to the self-insurer's motion, the employee argued, correctly, "[t]here is no dispute that the Employee suffered neck and shoulder injuries in the industrial accident in question. Furthermore, causal relationship and § 1(7A) are not in issue." See discussion, infra.

[6] Ideally, all judicial proceedings should be transcribed. See, e.g., Fleischmann v. Best Buy, 27 Mass. Workers' Comp. Rep. 107 (2013); LaFleur v. M.C.I. Shirley, 25 Mass. Workers' Comp. Rep. 393 (2011).

[7] The self-insurer alleges it first became aware the motion was denied upon receipt of the April 17, 2014 hearing decision; the employee asserts the judge denied the motion from the bench on January 14, 2013. Our case management system reveals the judge wrote, "Motion Denied 1-14-13," on the last page of the motion; however, the document containing that entry was not scanned into our system until April 25, 2014. Because the decision was filed on April 17, 2014, it is possible the self-insurer did not know its motion was denied until then.

The self-insurer raises three issues on appeal. The first two concern its challenge to the adequacy of Dr. Bullock's opinion on the issue of causal relationship. (Self-ins. br. 4-5.) It argues that because the employee's testimony at hearing did not square with the history of her injury as described to Dr. Bullock, the judge erred by adopting his opinion on causation. See Brommage's Case, 75 Mass. App. Ct. 825 (2009)(no obligation that judge adopt opinion of physician not based on facts found by the judge). We begin by noting the judge did credit the employee's testimony regarding the nature of her repetitive work *and* her report of an incident at work in May, 2005. Second, the self-insurer accepted the employee's claim; thus, the original causal relationship between her work, and her neck and shoulder injuries, was established.[8] Kareske's Case, 250 Mass. 220, 224 (1924); Adams v. Town of Wareham, 21 Mass. Workers' Comp. Rep. 207, 209 (2007). This fact, combined with the self-insurer's failure to raise the issue of ongoing causal relationship at hearing, constitutes a waiver of its right to argue this issue on appeal. As we have held:

> Where, as here, the medical question to be determined is beyond the common knowledge and experience of the ordinary layman, proof must depend upon expert medical testimony. As we understand the facts as found in this case, the issue of causal relationship between the industrial event, surgeries [to two different body parts], and the employee's present physical state is a real and critical one. Why then is the failure to deal with the issue of causal relationship not fatal? Because it was not raised by the insurer at the hearing! The insurer is bound by the statement of the grounds upon which it has declined to pay compensation . . . . Causal relationship was not raised.

Porter v. Flintkote, 1 Mass. Workers' Comp. Rep. 116, 117-118 (1987); see Ginley, supra; see also Yeshaiau v. Mt. Auburn Hosp., 27 Mass. Workers' Comp. Rep. 15 (2013)(error for judge to address issues settled by stipulation). There was no error.

Lastly, the self-insurer argues the judge erred by failing to notify the self-insurer, prior to filing her hearing decision,[9] that its motion was denied. In

[8] See footnote 1, supra.

[9] We assume, arguendo, this is what occurred.

circumstances similar to this, we have recommitted cases for the judge to reconstruct the record, and/or to rule on the motion. Fleischmann, supra; Sullivan v. Centrus Premier Home Care, 26 Mass. Workers' Comp. Rep. 301 (2012); Godinez v. Perkins Paper Co., Inc., 22 Mass. Workers' Comp. Rep. 83 (2008); Nassios v. Allied Bldg. Prods., 22 Mass. Workers' Comp. Rep. 15 (2008); Mayo v. Save On Wall Co., 19 Mass. Workers' Comp. Rep. 1 (2005).

There is no need to recommit this case. First, the primary reason for recommittal articulated by the self-insurer is to allow it to explore the issue of causal relationship by further cross-examination of the employee.[10] As noted, that issue was not raised at hearing, and is waived. Second, the judge's decision to deny the motion was correct. Because the self-insurer did not raise causal relationship, Dr. Bullock was left only to address the extent of the employee's disability referable to her right shoulder and neck. And that is exactly what he did.

The decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), the self-insurer is ordered to pay the employee an attorney's fee in the amount of $1,596.24.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **October 16, 2014**

[10] "Had the self-insurer been informed of the Judge's ruling, it would have requested that the hearing be re-opened in order to further cross-examine the employee to determine which injury the employee was relying upon." (Self-ins. br. 6.)