COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 002774-12**

Mary A. Georgian	Employee
Windham Group	Employer
Peerless Indemnity Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Fabricant, Harpin and Calliotte)

The case was heard by Administrative Judge Maher.

APPEARANCES
J. Channing Migner, Esq., for the employee at hearing
John A. Smillie, Esq., for the employee on appeal
Shelley Harvey, Esq., for the insurer

FABRICANT, J. The parties cross-appeal from a decision awarding the employee §§ 13 and 30 medical benefits, a closed period of § 34 total disability benefits, and ongoing § 35 partial disability benefits. The insurer raises two issues on appeal, arguing error in an order of indemnity benefits without proof of a causally related incapacity, and the judge's failure to perform an adequate § 1(7A) analysis regarding the employee's anxiety condition. The employee raises two issues, arguing error in reducing the § 34 weekly total incapacity benefits to § 35 partial incapacity benefits as of March 14, 2014, and in finding that treatment for lumbar, cervical and myofascial pain was not reasonable or necessary after that date.[1] We find the employee has failed to prove any causally related anxiety condition, and we reverse the award of medical treatment for all claimed anxiety treatment. However, the judge's findings on the remaining issues fail to allow a proper appellate review, and therefore require recommittal.

[1] The employee also initially claimed benefits for an ankle injury sustained subsequent to the January 25, 2012 motor vehicle accident. (Dec. 3, Tr. 4.) However, the judge did not find the ankle injury to be causally related, and the employee did not appeal this issue. (Dec. 13, and Employee's brief.)

At the time of the hearing, the employee was fifty-four years old. She has a bachelor's degree, and worked for the employer as a vocational rehabilitation counselor for ten years. (Dec. 5.) She worked primarily at home, using a computer to communicate and prepare reports and labor market surveys. However, her job also required that she do a significant amount of driving, and on January 25, 2012, she was injured in a work-related motor vehicle accident. (Dec. 5-6.) After being seen in the emergency room, she continued to complain of headaches, dizziness, and vision problems, in addition to having trouble remembering things. She also continues to complain of upper back, neck and low back pain with radiation, and claims to have subsequently fallen several times due to the dizziness. (Dec. 6.)

The insurer paid § 34 benefits, without prejudice, from January 26, 2012 to June 19, 2012, after which the employee filed a claim for further benefits.[2] Following the § 10A conference, the judge awarded ongoing § 34 benefits, as well as §§ 13 and 30 medical benefits related to her right ankle and treatment for anxiety.[3] (Dec. 3.) The insurer appealed, contesting liability, disability, and causal relationship, specifically for the claimed injuries to the knee, ankle and head, and raised §1(7A) as an affirmative defense to the anxiety claim.[4] (Dec. 4.)

The judge adopted portions of the § 11A report of Dr. Sherry Estes, a neuropsychologist who examined the employee on March 5, 2013. Dr. Estes opined that the employee was not significantly or functionally limited by any cognitive difficulties at the time of the exam, and that her cognitive limitations were, at that time, subjective in nature. She further opined there was "some indication that anxiety has played a role in the difficulties that she has experienced," and that she appears to be experiencing an

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[2] 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).

[3] The employee takes Sertaline for anxiety, which started about two years prior to the accident. Her dosage was increased after the accident. (Dec. 6, Tr. 43-44.)

[4] There were a number of other conditions addressed by the judge, including cervical, lumbar, myofascial pain, and vision problems. Neither party alleges these conditions were not in play.

emotional reaction associated with her reported changes in functional status. (Dec. 7.) The judge authorized additional medical evidence due to the complexity of the medical issues. (Dec. 7.)

The judge credited the opinions of several doctors, including those of Dr. Joan Swearer, the employee's treating neuropsychologist. Dr. Swearer opined that the employee's performance was "border-line impaired on some tests of attention and working memory and on index of cognitive processing," and that "at best her performance was within normal limits across cognitive demands." (Dec. 8.) However, it is "not possible to determine whether impaired test scores reflect cognitive deficits." (Dec. 8.) Dr. Swearer further opined that "chronic pain, daytime fatigue, medication effects and emotional distress are likely contributing factors to what difficulties she has with memory and through day to day activities." (Dec. 8, Ex. 6.)

The judge also adopted parts of the July 24, 2013 and September 23, 2013, reports of Dr. Faren Williams, a physiatrist, where he opined that "there are significant underlying psychological stressors which may not be adequately identified and treated." (Dec. 10.) He also opined that a brain MRI performed in June 2012 indicated no posttraumatic injury or brain abnormality, and that the employee's pain complaints and symptom magnification were disproportionate to clinical findings. Id.

The judge further adopted the opinions of treating physician Dr. David DiBenedetto of the Boston Paincare Center from his reports between January 14, 2014 and March 14, 2014. Dr. DiBenedetto opined that the employee's symptoms of memory loss, cognitive impairment, ongoing dizziness, tunnel vision and headaches are "commonly associated with traumatic brain injuries." He further opined that advanced degenerative joint disease in the cervical spine may be causing her cervical pain, and in addition, she has L5 degenerative joint disease consistent with her complaints of pain. He noted that while the etiology of her myofascial pain syndrome is unclear, the results of her neurocognitive testing and concerns may be in part due to impairment from medications she takes. Further, "an ESI . . . performed in February 2014 . . . reported 75-

85% improvement in symptoms with the ability to perform activities of daily living." (Dec. 8-9.)[5]

The judge also credited the employee's testimony that she suffers from increased anxiety, has difficulty focusing, and becomes sleepy from her prescribed medication. (Dec. 11.) He found that "actual diagnosis and treatment was not substantiated by the adopted medical evidence," with respect to her complaints of pain in her back, neck, shoulder, as well as her headaches and vision problems. (Dec. 11.) Regardless, he found the employee was totally incapacitated from June 20, 2012 until March 14, 2014,[6] Thereafter, he found her to be partially incapacitated, apparently due to "cognitive limitations related to daytime fatigue due to medication effects and emotional distress." (Dec. 11.) In finding a causal relationship to the employee's symptoms of anxiety, the judge wrote:

> The insurer raises Section 1(7A) as an affirmative defense in terms of the employee's anxiety condition, but I don't have sufficient evidence to prove the factual predicates thereof to put it into play because I do not adopt Dr. Kereshi's opinion as to the employee's anxiety. Although the Employee admitted that she had previously treated for anxiety, she also testified that she increased her medication subsequent to the accident. This could be construed to be a combination issue or in the alternative a condition resulting in the sequelae of the physical injury. However, absent cogent persuasive and adopted medical opinion I am at a loss as to what extent her ongoing anxiety is related to the accident. I do adopt findings from Dr. Williams that there are significant psychological stressors which have not been adequately identified. Therefore, causation for ongoing psychological treatment is related.

(Dec. 12.)

[5] The judge adopted the opinions of three additional doctors. He adopted Dr. Rebecca Lansky's opinion the employee has a traumatic brain injury with myofascial pain and low back strain, and needs a behavioral ophthalmologist due to problems with tracking and scanning. (Dec. 8.) He credited Dr. Bruce Hsu's opinion "that status post motor vehicle accident [she] has a large degree of myofascial pain . . . " (Dec. 9.) And, he adopted Dr. Shashidhara Nanjundaswamy's opinion that two of her medications make her sleepy. (Dec. 10.)

[6] March 14, 2014 is the date of an examination by Dr. DiBenedetto. (Dec. 13.)

With respect to her §§ 13 and 30 claims, the judge found:

> I adopt the medical opinions referred to and the credible testimony of the Employee in concluding that the Employee's medical treatment for post-concussive treatment is reasonable and necessary until July 24, 2013.[7] I find that lumbar, cervical and myofascial pain treatment was reasonable and necessary up until March 14, 2014. I find that psychiatric treatment related to anxiety and treatment modalities to assist in cognitive enhancement through alternative pain management is reasonable, necessary and causally related to the industrial accident.

(Dec. 14.)

The judge found that the employee's post-injury falls were not related to the work place accident, and that the sequelae of those falls, including treatment for her right ankle, were not causally related. (Dec. 13.) He also found her claim for vision problems was not substantiated by the adopted medical evidence.

The judge ordered the insurer to pay reasonable and necessary medical expenses including psychological/pain management, in addition to § 34 benefits from June 20, 2012 to March 13, 2014, and § 35 partial incapacity benefits from March 14, 2014 to date and continuing. (Dec. 13-15.)

On appeal, the insurer argues the decision should be reversed because the medical opinions adopted by the judge do not support an ongoing incapacity. Specifically, the insurer maintains the judge erred in finding the employee totally disabled through March 13, 2014, and partially disabled thereafter, and requests a reversal of that order, retroactive to July 24, 2013.[8] The insurer does not challenge the award of medical treatment for post-concussive syndrome up to July 24, 2013, although, at oral argument, it did challenge the award of treatment for cervical, lumbar and myofascial pain before

[7] July 24, 2013 is the date of a report by Dr. Williams. (Tr. 92.)

[8] Although the insurer's brief cites July 24, 2013 as the cutoff date for benefits, it revised that date to September 9, 2013 at oral argument. However, as the judge did not adopt Dr. William's opinions citing September 9, 2013, there is no evidence to support an award of benefits up to that date.

March 14, 2014. Finally, the insurer argues error in the judge's failure to perform a full § 1(7A) analysis with regard to the employee's alleged anxiety.

We first address the insurer's contention that the ongoing order of medical benefits for treatment for anxiety is unsupported by medical evidence. The insurer argues that the judge erred by not performing a full §1(7A) analysis, as the insurer raised § 1(7A) as an affirmative defense regarding the employee's anxiety condition. Although some of the judge's § 1(7A) findings are confusing, he is clear that the insurer failed to "prove the factual predicates . . . to put it into play." (Dec. 12.) Although the employee testified she had been taking Sertraline for anxiety for two years prior to the work incident, and it was increased after the accident, (Dec. 6), the judge did not find her testimony sufficient to meet the insurer's burden of production: "There are two essential elements of an insurer's burden of production in establishing the threshold requirements for a §1(7A) applicability: the existence of a pre-existing condition, and the combination of that pre-existing condition with the alleged work injury." Baldini v. Department of Mental Retardation/DMR3, 23 Mass. Workers' Comp. Rep. 159, 163 (2009) citing MacDonald's Case, 73 Mass.App.Ct. 657, 660 (2009). The judge did not err by finding the employee's testimony, without more, had proven neither.

Despite the judge's findings regarding the non-applicability of §1(7A), the employee still needs to prove simple "but for" causation in order to prevail in her anxiety-related claim. See Cornetta's Case, 68 Mass. App. Ct. 107 (2007). The judge appears to find the employee had met this burden, as he found "causation for ongoing psychological treatment is related." (Dec. 12.) However, none of the opinions adopted by the judge establishes even simple causation. Although Dr. Estes, the § 11A neuropsychologist, states the employee "appears to be experiencing an emotional reaction" and there is "some indication that anxiety has played a role in the difficulties that she has experienced," (Dec. 7), the § 11A physician never causally relates the employee's emotional problems or anxiety to her accident. Similarly, Dr. Swearer, the examining neuropsychologist, opines only that emotional distress is one of the likely contributing factors to her difficulties with memory and daily activities, (Dec. 8), but fails

to causally relate any emotional distress to her work accident. Dr. Williams, on whose opinion the judge specifically relies, (Dec. 12; OA Tr. 26), opined only that "there are significant underlying psychological stressors which may not be adequately identified and treated." (Dec. 10, 12.) This opinion does not satisfy the simple causation standard. Moreover, during his oral argument, the employee's attorney conceded that "it looks like we're without a medical opinion showing causal relationship of the current anxiety." (Tr. 25.) Accordingly, we reverse the award of the claimed treatment related to anxiety.

We next address the award of medical treatment for cervical, lumbar and myofascial pain up to March 14, 2014. On that date, Dr. Di Benedetto opined that the employee's cervical and lumbar pain was due to degenerative disc disease, and that the etiology of her myofascial pain syndrome was unclear. (Dec. 9.) While the judge adopted this opinion, he did not adopt any opinion establishing causal relationship between the employee's work injury and any of these conditions *prior* to that time.[9] Id.

Similarly, the ongoing award of "alternative pain management" to "assist in cognitive enhancement" (Dec. 14) appears to be unsupported by the medical evidence. Neither Dr. Estes nor Dr. Swearer clearly indicates either that the employee has any cognitive limitations or that they are causally related to the work injury. Dr. Estes opined the employee's cognitive limitations were, at the time of her exam on March 5, 2013, subjective in nature, and the employee is "not significantly or functionally limited by any cognitive difficulties." (Dec. 7.) Dr. Swearer opined "it is not possible to determine whether impaired test scores reflect cognitive deficits" and that "at best her performance was within normal limits across cognitive demands." (Dec. 8.) Dr. Rebecca Lansky does find a traumatic brain injury with myofascial pain and low back strain requiring treatment, but there is no further analysis relating this to incapacity in any meaningful

[9] At oral argument, employee counsel stated that there had been no treatment for the cervical, lumbar or myofascial pain syndrome prior to Dr. DiBenedetto's March 14, 2014 report. (OA Tr. 23.) Although it appears the employee had some treatment for these conditions prior to March 14, 2014, the employee has cited no opinion causally relating the need for treatment to the work injury. Given the opportunity following oral argument to direct this Board to a causal relationship opinion for the cervical, lumbar and myofascial pain conditions, the employee was unable to do so. (OA Tr. 23-24; e-mail to reviewing board dated 8/6/15.)

way. (Dec. 8.) The judge did find that the "medication she takes due to injuries related to the work injury contributes to her cognitive difficulties." (Dec. 13.) He identified those medications as Gabapentin and Tramadol for pain, Sertraline for anxiety, and medication at night for headaches before she goes to bed. (Dec. 6) However, he does not identify the type of pain for which she is taking medication and for what period of time it is causally related to her industrial injury.

Overall, this record does not readily present a clear picture of any injury or disability which is, on its face, causally related by the medical evidence. There are a number of medical opinions adopted which ascribe a variety of symptoms and conditions to a rather convoluted timeline following the claimed date of injury. However, other than the anxiety-related claims, for which we specifically find no evidence of a causally related injury or disability, there is no definitive presentation by the parties, or analysis by the judge, which would provide a record upon which a proper appellate review of these issues may be conducted. "It is the duty of an administrative judge to address the issues in a case in a manner enabling this board to determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Praetz v. Factory Mutual Engineering & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). When the record does not allow for a complete appellate review, "it is the duty of the board to recommit the case…until a proper record is obtained." Id.

Accordingly, we reverse the award of medical benefits related to all claimed anxiety-related issues. We vacate the decision on all other issues, and recommit for a thorough analysis of all remaining contested issues, including incapacity after July 24, 2013, and causal relationship and need for medical treatment of the cervical, lumbar and myofascial pain, as well as "alternative pain management" to "assist in cognitive enhancement."[10]

So ordered.

[10] We need not address the employee's arguments, given our disposition of this case.

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Bernard Fabricant
Administrative Law Judge

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William C. Harpin
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: June 28, 2016