COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 000765-13**
Melvin Morales	Employee
Not Your Average Joe's, Inc.	Employer
Travelers Indemnity Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Calliotte)

The case was heard by Administrative Judge Bean.

APPEARANCES
Denitsa Valtchanova, Esq., for the employee
Scott E. Richardson, Esq., for the insurer

KOZIOL, J. The employee appeals from a decision denying and dismissing his claims for §§ 34, 35 and 34A benefits. (Dec. 128.) On appeal, the employee raises six arguments, one of which is dispositive, requiring us to vacate the judge's decision and recommit the matter for further findings of fact.

The employee was twenty-five years old at the time of the hearing. (Dec. 124.) He immigrated to this country from Guatemala in 2004, attended the Lawrence public schools through the tenth grade, and thereafter earned his GED. (Dec. 124.) He has work experience as a cashier, laborer and cook, each of which the judge found "required heavy lifting." (Dec. 124.) "In September 2012 the employee developed low back pain after sleeping on a couch." (Dec. 124.) An MRI showed an L5-S1 disc herniation and the employee received treatment, including an epidural steroid injection that relieved his pain. (Dec. 124.) "He was pain free by early December." (Dec. 124.)

The employee worked as a cook and laborer for the employer. On January 5, 2013, he injured his back at work when he slipped and fell off a ladder while cleaning an ice machine. (Dec. 124.) The employee landed on his back on the floor and was taken

by ambulance to the hospital, where he was treated and released. Id. He attempted to return to work for two days in March of 2013, but was sent home because he was unable to perform his job. (Dec. 124.) He remains out of work.

The insurer initially paid the employee § 34 benefits, and later, on July 17, 2014, filed a complaint to modify or discontinue those benefits. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(judicial notice taken of board file). In effect, the judge's June 2, 2015, conference order allowed the discontinuance request, although the order was styled as an order to pay the employee a closed period of § 34 benefits from January 6, 2013 to July 12, 2015. (Dec. 123: O.A. Tr. 21-23.) The employee appealed, and, pursuant to § 11A, he was examined by Dr. Paul N. Chervin on August 6, 2015. (Dec. 123.) At the hearing, the employee filed two motions, one to join a claim for § 34A benefits, and the second to declare inadequate and strike Dr. Chervin's report. (O.A. Tr. 4-5.) The judge advised the parties he would rule on both motions at the end of the lay testimony.[1] Ultimately, he allowed joinder of the § 34A claim and submission of additional medical evidence, but did not strike Dr. Chervin's report. (Dec. 123; Tr. II, 17-19; O.A. 28-29.) On the second day of hearing, the parties submitted a joint exhibit consisting of thirteen (13) tabbed entries of their respective additional medical records. (Tr. II, 19-21.) The record closed six days later, on March 17, 2016. (Dec. 123.)

The insurer did not appeal from the conference order allowing it to discontinue the employee's § 34 benefits as of July 12, 2015, so the benefit period in issue at hearing was the employee's claim for continuing benefits after July 12, 2015, and his joined claim for § 34A from June 17, 2015, and continuing. (Tr. I, 4.) In his March 25, 2016, decision the judge made the following pertinent findings of fact concerning the medical evidence:

> Because Dr. Chervin stepped beyond the bounds of the dispute as defined by Ruiz I allowed the parties to submit additional medical evidence. The insurer presented the 2014 report of Dr. Warnock and the 2015 report of Dr. Martinez. The employee presented numerous notes and diagnostic tests, but most were old, written in 2012-2014. The most recent document is Dr. Doorly's February 2015

[1] Lay testimony was taken on January 21, 2016 and March 11, 2016. Hereinafter, we refer to the transcripts as "Tr. I" and "Tr. II," respectively.

> note and the most recent total disability note is Dr. Oladipo's August 13, 2014 note.
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> Dr. Oladipo is the employee's treating orthopedic doctor. Several of his notes have been entered into evidence as exhibit 7. In his note of November 16, 2013 he recorded that the employee suffered a work injury to his back, without describing the events surrounding the work injury. In his most recent note, dated December 1, 2014 he offered a diagnosis of persistent back pain, lumbar disc disease post injury and lumbar surgery post injury. He wrote several notes keeping the employee out of work, causally relating the total disability to 'a work related injury.' The most recent note is dated August 13, 2014.

(Dec. 126-127.) In his "General Findings" the judge determined:

> the employee is partially disabled and able to return to at least three quarter time light duty work. As his stipulated average weekly wage is $205.47, he is not entitled to § 35 partial disability weekly wage replacement compensation as his light duty work capacity is more than $205.47 even at a minimum wage rate. In making these determinations, I rely on the credible medical opinions of Doctors Doorly, Warnock and Martinez. He may have some period or periods of total disability in the future if he receives an implantable pump or enrolls in a pain clinic as recommended by Dr. Doorly. *I note that the most recent total disability opinion was offered on August 13, 2014, more than 19 months ago.*

(Dec. 127; emphasis added.) The judge then denied and dismissed the employee's claim for "wage replacement benefits pursuant to §§ 34, 35 and 34A." (Dec. 128.)

The employee argues the decision must be vacated because the judge failed to consider the parties' joint exhibit submitted at the March 11, 2016, hearing. He asserts that, contrary to the judge's decision, the parties' joint exhibit shows the employee submitted medical evidence providing total disability opinions from 2015 and 2016. We agree.

The board file is devoid of any trace of the "joint exhibit," dated March 11, 2016, which was submitted at the hearing.[2] See Tr. II, 19-21; Rizzo, supra. We have stated

[2] As a result of our discussion at oral argument, the parties supplied the reviewing board with a copy of the joint exhibit which appears in OnBase as "Exhibit 4 to the Reviewing Board Brief" of the employee. Rizzo, supra. We observe that the most expedient way to have brought the

that it is incumbent upon the parties to check OnBase, the department's document management system, within fourteen days of the submission of an exhibit, in order to ensure that the documents properly appear in the board file. Uka v. Westwood Lodge Hosp., 28 Mass. Workers' Comp. Rep. 19, 21 n.4 (2014). For two reasons, any attempt the parties could have made to comply with that practice would not have prevented the error that occurred here. First, the decision was issued on March 25, 2016, eight days after the record closed and on the fourteenth day after the documents were admitted in evidence. Second, OnBase shows that hearing exhibits 4-12, were not even entered into OnBase until March 30, 2016, five days *after* the decision was written.[3]

On the record, the judge acknowledged that the joint submission contained thirteen (13) additional medical exhibits. (Tr. II, 20-21.) He then stated he would re-number those exhibits because he previously admitted three exhibits on the first day of hearing. (Tr. II, 21.) However, his decision lists only nine additional medical exhibits, numbered 4-12. (Dec. 123.) Moreover, the nine "hearing exhibits" numbered 4-12 in OnBase do not include all of the thirteen joint exhibits submitted at hearing. Rizzo, supra. Instead, OnBase shows that the renumbered "Exhibit Index 4-12," attached to the alleged "hearing" exhibits, is dated June 1, 2015, and is identical to the "Employee's Impartial Medical Packet" that accompanied the documents submitted at the § 10A conference on June 1, 2015.[4] Rizzo, supra.

We emphasize that OnBase is the department's *only* board file and record. On the day the decision issued, none of the alleged hearing exhibits referenced in the decision

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exhibits to our attention would have been through an offer of proof attached as an exhibit to the employee's brief at the time of filing. (O.A. Tr. 8-12.)

[3] We observe that OnBase also erroneously states that hearing exhibits 4-12 were received on January 21, 2016, the first day of the hearing. The judge did not open the medical evidence and accept the parties' joint exhibit until the second day of hearing, March 11, 2016. Rizzo, supra.

[4] Despite bearing a date of June 1, 2015, OnBase incorrectly states the "Date of Document" is June 2, 2015. Rizzo, supra. We have no explanation as to how the conference exhibits became substituted for the actual hearing exhibits.

were contained in the board file. Rizzo, supra. When a judge directly receives evidence from the parties at a proceeding, the judge must ensure that the evidence is entered into OnBase *before* the judge files the decision.[5] Because the judge's decision erroneously states the last disability note submitted by the employee was August 13, 2014, the judge clearly did not view the parties' joint exhibit, which the parties agree was the only additional medical evidence submitted at the hearing. Under the circumstances, the decision must be vacated and recommitted for the judge to review the missing evidence and to make further findings of fact and rulings of law after considering that evidence. Uka, supra, at 22; Tunis v. Hillcrest Educ. Ctrs., 26 Mass. Workers' Comp. Rep. 299 (2012).

We briefly address two of the employee's remaining arguments on appeal that do not require further action on recommittal. First, the employee takes issue with the judge's failure to strike the report of Dr. Chervin. (O.A. Tr., 21.) We affirm the judge's decision on that issue. Because Dr. Chervin's report expanded the issues in dispute, the judge properly declared it inadequate, which was the only action required. Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399, 402 (1997).

The employee also claims the judge was biased against him because he made a point of mentioning the employee's young age and commented that he only awarded § 34A benefits to one other person who was so young. We note that the employee never brought this concern to the judge by objecting to the judge's statement or moving for the judge to recuse himself on the ground of bias. See Comeau v. Enterprise Electronics, 29 Mass. Workers' Comp. Rep. 187, 193 (2015)(when "a claim of judicial bias is raised, the judge involved must address that claim and make findings on whether or not he has demonstrated bias towards one or the other party"). "It is now beyond dispute that an

[5] This practice is consistent with the June 17, 2015, internal memorandum issued to Administrative Judges and their assistants by Senior Judge Hernández, which states, "it is critical that all Hearing exhibits . . . are uploaded into DMS as quickly as possible," and directs all Administrative Judges to "provide all exhibits and motions to their respective support staff at the conclusion of every Hearing." It is also consistent with the Department's "Document Management System Operational & Procedural Plan, Version 1.5.5" amended on May 17, 2016.

issue must be raised and evidence thereon presented at hearing to warrant resolution on appeal," or the issue is waived. Desosa-Gonzales v. Aero Plastics, 9 Mass. Workers' Comp. Rep. 318, 319 (1995). In any event, we observe that age is one factor the judge must consider in determining the extent of the employee's incapacity; consequently, we do not perceive the judge's comments regarding the employee's youth, on their face, to evince a bias against the employee. Frennier's Case, 318 Mass. 635, 639 (1945)(in determining eligibility for § 34A benefits "regard must be had to the age, experience, training and capabilities of the employee").

We note that the employee's remaining arguments concern the judge's incapacity analysis and denial and dismissal of his claims for ongoing weekly benefits. We do not address those arguments as the complained-of findings have been vacated by our decision, and the employee is free to bring his concerns to the judge on recommittal. Accordingly, we vacate the judge's decision and recommit the matter for further review and findings of fact consistent with this decision.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: ***January 31, 2017***