COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS. 045588-04 036017-12**
Michael J. Tuohey, III	Employee
M.B.T.A.	Employer
M.B.T.A.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Calliotte)

The case was heard by Administrative Judge Vendetti.

APPEARANCES
Bernard J. Mullholland, Esq., for the employee
Joseph S. Buckley, Esq., for the self-insurer at hearing
Richard L. Neumeier, Esq., for the self-insurer on appeal

KOZIOL, J. The employee appeals from a December 15, 2016, decision denying and dismissing his claims seeking: 1) § 35 partial incapacity benefits from May 6, 2008, through October 3, 2008, based on a July 8, 2004, work-related injury; and, 2) § 34 temporary total incapacity benefits from February 12, 2014, through March 30, 2014, based on a September 6, 2012, work-related injury. (Dec. III, 10.)[1] The judge denied the § 35 claim, concluding it was filed three years beyond the four-year limitations period set

[1] Although this is the third hearing decision regarding the July 8, 2004, injury, it is the first hearing decision regarding the September 6, 2012, injury. Because both claims concern injuries to the employee's left shoulder and were joined for hearing, hereinafter we refer to the December 30, 2013, hearing decision pertaining to the July 8, 2004, date of injury as "Dec. I;" the March 28, 2014, hearing decision concerning the employee's motion for an enhanced attorney's fee for work performed in connection with the hearing culminating in Dec. I, as "Dec. II;" and, the December 15, 2016, hearing decision at issue in this appeal, concerning both the July 8, 2004, and the September 6, 2012, injuries, as "Dec. III." We observe that the judge should not have issued a separate hearing decision, regarding the employee's motion for an enhanced attorney's fee. (Dec. II.) This issue should have been resolved at the same time as the employee's pending underlying claim. Richards v. US Bancorp, 28 Mass. Workers' Comp. Rep. 115, 124 (2014)(when proceeding does not resolve all of the issues presented by the claim, judge should "inform the parties that one full and final decision, incorporating his finding and rulings on all of the issues necessary to dispose of the case . . . will issue *after* the remainder of the case is completed")(emphasis in original).

forth in § 41, and finding that the self-insurer was prejudiced by the delay in filing. (Dec. III, 9.) The judge also denied the § 34 claim, determining it was barred by § 10A(3), because the employee did not appeal from an April 8, 2014, conference order allowing joinder of a claim for § 34 benefits for that timeframe. (Dec. III, 9-10.) Because we conclude the judge erred in both respects, we vacate the decision and recommit the matter for a hearing de novo. In order to address the issues on appeal, we set forth in detail the complicated procedural history of these claims.

The employee sustained an injury to his left shoulder while working on July 8, 2004. The employee "went out of work and eventually underwent surgery on his left shoulder in October 2004," consisting of a left "open-Bankart procedure." (Dec. I, 5, 7.) "The employee was paid benefits until he returned to work after the surgery." (Dec. II, 2.)

In May of 2008, the employee filed a claim for § 34 temporary total incapacity benefits and §§ 13 and 30 benefits, based on the July 8, 2004, injury. The claim sought an order requiring the self-insurer to pay for an additional left shoulder arthroscopic surgery prescribed by the employee's treating orthopedist, Dr. Gary S. Perlmutter, followed by a closed period of § 34 benefits. A different administrative judge denied the employee's claim at conference, and the employee appealed. The employee underwent a § 11A impartial medical examination performed by Dr. Scott Harris, on January 2, 2009. (Dec. I, 5.) Dr. Harris filed an addendum to his report on April 28, 2009, and re-examined the employee on March 23, 2011. (Dec. I, 5.) While the employee's claim for surgery was pending, the judge retired and the matter was reassigned to the present judge who conducted the hearing de novo. The hearing record closed on June 14, 2012. (Dec. I, 5.)

While the parties were waiting for a hearing decision concerning the July 8, 2004, injury, the employee reinjured his left shoulder in a second work-related accident on September 6, 2012. On July 19, 2013, the employee filed a claim seeking medical

benefits for this 2012 injury. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(judicial notice taken of board file).

On December 30, 2013, the judge issued her hearing decision regarding the July 8, 2004, injury, ordering the insurer to pay for the arthroscopic surgery prescribed by Dr. Perlmutter. (Dec. I, 14.) Neither party appealed. After receiving that decision, the employee returned to Dr. Perlmutter on January 28, 2014. (Dec. III, 8.) The judge found Dr. Perlmutter "diagnosed post-surgical changes in the left shoulder including hypertrophic degenerative AC changes, partial rotator cuff tear, and poor capsular ligament tissue quality, all contributing to instability in that joint;" he then referred the employee to Dr. Thomas F. Holovacs. (Dec. III, 8.) Dr. Holovacs saw the employee on February 12, 2014, and recommended a more extensive surgical procedure. (Dec. III, 8.)

Meanwhile, the employee's claim seeking payment of medical benefits based on the September 6, 2012, injury was scheduled for a § 10A conference on March 26, 2014. (Dec. III, 7.) The employee sought to join a claim for § 34 benefits as he "left work after 2/12/14 based on a work status report from Dr. Holovacs." (Dec. III, 8.) The parties' Form 140 Conference Memorandum states the employee claimed § 34 benefits from "February 12, 2014, to date and continuing." Rizzo, supra. The self-insurer filed a written objection seeking to prevent the conference from going forward on the employee's new claim for § 34 benefits. Id. On April 1, 2014, the employee filed a written motion supporting joinder and payment of his claim for § 34 benefits. Id. On April 8, 2014, the judge issued her § 10A conference "Order of Payment § 34," which contained the following language:

> Based on the information submitted at the conference, I order the insurer to pay the claimant temporary total incapacity compensation under M.G.L. c. 152, § 34, at the maximum rate of $1,135.82 per week based on an average weekly wage of $2,000.00 **from the date of surgery and seven (7) months after the surgical date,** plus medical benefits under the provisions of M.G.L. c. 152, § 30. **The insurer is to pay all outstanding medical bills for services related to the left shoulder injury. The insurer is to pay for all ongoing medical services, including left shoulder surgery recommended by Dr. Holovacs. The employee's Motion to Join § 34 benefits claim is allowed; the claim is allowed.**

Rizzo, supra. (emphasis in original.) The self-insurer appealed from this order, but subsequently withdrew its appeal. The employee did not appeal.

On May 22, 2015, the employee filed the present claims. Regarding the July 8, 2004, injury, he sought § 35 benefits from May 6, 2008 through October 3, 2008. Regarding the September 6, 2012, injury, he sought §34 benefits from February 12, 2014, when he left work on Dr. Holovacs's recommendation, to March 30, 2014, the day before his surgery. Id. After the judge denied both claims at conference, the employee appealed, and, following a hearing, the judge denied and dismissed both claims. (Dec. III, 10.) Regarding the employee's § 35 claim based on the July 8, 2004, injury, the judge stated,

> I conclude that the [employee's] claim for section 35 partial disability benefits is barred by section 41 of the Act which requires claims for compensation to be filed within 4 years from the date the [employee] first became aware of the causal relationship between the disability and his employment. In this instance, the [employee] brought his claim for section 35 benefits more than 7 years after the claimed period of disability commenced. The [employee's] testimony showed that at times he was unable to recall past events with clarity and at times he was unable to recall the whether [sic] certain of his time out of work was related to his industrial injury. I am persuaded that the MBTA has been prejudiced by the 7 year delay in filing and the erosion of the [employee's] memory.

(Dec. III, 9.)

On appeal, the employee argues the judge erred as a matter of law in denying and dismissing his claim for benefits, and we agree. The law is well settled in this area. As the procedural history shows, the statute of limitations has no bearing on the employee's claim based on the July 8, 2004, injury because "[t]he payment of compensation for any injury pursuant to this chapter or the filing of a claim for compensation as provided in this chapter shall toll the statute of limitations for *any* benefits due pursuant to this chapter for such injury." G. L. c. 152, § 41 (emphasis added); Baker's Case, 55 Mass. App. Ct. 628, 630-634 (2002)(tolling provision in § 41 applies to claims stemming from an injury for which benefits have been paid). Pursuant to 452 Code Mass. Regs. § 1.02,

"[t]oll as used in M.G.L. c. 152, § 41, shall mean permanently satisfies." Here, not only were benefits paid by the self-insurer following the injury, but a hearing decision, which was not appealed, was issued ordering payment of additional benefits. (Dec. 1.) In addition, insofar as the judge found the claim was barred by § 41 because the insurer was "prejudiced" by a late filing of the claim for the closed period of § 35 benefits, the judge erred as a matter of law. Green's Case, 46 Mass. App. Ct. 910, 911 (1999)("prejudice is not a consideration in determining whether the tolling provisions of § 41 apply"). The judge provided no other reason for denying and dismissing the employee's claim; accordingly, her order denying and dismissing the employee's claim for § 35 benefits based on the July 8, 2004, injury is vacated.

Regarding the employee's claim for a closed period of § 34 benefits based on the September 6, 2012, date of injury, the judge made the following findings:

> At conference, I allowed the [employee] to join a claim for section 34 benefits. Pursuant to my order dated 4-8-2014 the MBTA was ordered to pay for all outstanding and ongoing medical services related to the [employee's] left shoulder surgery and for temporary total incapacity benefits in accordance with section 34 of the Act from the date of surgery and continuing for 7 months after the surgical date. The [employee] did not appeal this order.

(Dec. III, 7.) The judge then concluded:

> [T]he [employee's] claim for section 34 total temporary disability benefits for the claimed period 2-12-2014 to 3-30-2014 is barred because the [employee] did not file an appeal of the conference order which commenced his benefits on the date of surgery to run prospectively for 7 months. Section 10(A)(3) [sic] of the Act requires any party aggrieved by an order of an administrative judge to file his appeal within 14 days from the filing date of such order. Failure to file a timely appeal is deemed to be an acceptance of the administrative judge's order and findings.

(Dec. III, 9.) If the judge's findings accurately reflected the language of her § 10A order, we would agree that the employee's failure to appeal from that order would bar him from seeking recovery of benefits from February 12, 2014, the date he left work on the recommendation of Dr. Holovacs, through March 30, 2014, the day before his surgery.

However, aside from the boiler plate language that appears in virtually all § 10A orders, the judge's April 8, 2014, conference order contained additional language, also emphasized by the judge in boldface type, beyond the portion of her order she recited in her decision. (Dec. III, 7.) Significantly, in discussing the conference order in her decision, the judge left out the remainder of her specific order which stated, "**[t]he employee's Motion to Join § 34 benefits claim is allowed; the claim is allowed.**"

In the first portion of her order, the judge, without mentioning the date the surgery was performed, ordered payment of § 34 benefits for a period "from the date of the surgery and seven (7) months after the surgery." Rizzo, supra. This order limited the length of the award, rather than granting the open-ended "to date and continuing" order claimed by the employee in the Conference Memorandum, Form 140. Rizzo, supra. The judge went on to order medical benefits, including the surgery recommended by Dr. Holovacs, ending her specific order by allowing "the motion to join" the § 34 claim, and stating "the claim is allowed." Rizzo, supra. Because the "claim" was broader than the order, the last sentence would be meaningless if the judge only intended to order § 34 benefits from the date of surgery to seven months following the surgery, as stated at the beginning of her order. By also allowing the "claim," the judge appeared to allow recovery from the date claimed, February 12, 2014, to seven months from the date of the surgery, stated earlier in her order. The judge erred by neglecting, in her decision, to mention or consider all the words set forth in her § 10A conference order. Consequently, we agree the judge erred in ruling that § 10A(3) barred the employee from recovering benefits for the period of February 12, 2014, to March 30, 2014, which was part of the claim she allowed in the unappealed conference order. Accordingly, we also vacate the judge's order denying and dismissing the employee's claim for the closed period of § 34 benefits from February 12, 2014, through March 30, 2014.

Because we vacate the denial and dismissal of the employee's claims regarding both dates of injury, we recommit the matter for a hearing de novo on all of the employee's claims. As the administrative judge no longer serves at the department of

industrial accidents, we refer the case to the Senior Judge for assignment to a new judge for a hearing de novo. Pursuant to G.L. c. 152, § 13A(6), the self-insurer is directed to pay the employee's counsel a fee in the amount of $1,654.15.

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: **December 6, 2017**