COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 002651-14**

Michael Ovalle	Employee
City of Everett	Employer
City of Everett	Self-insurer

REVIEWING BOARD DECISION

(Judges Calliotte, Koziol and Fabricant)

This decision was heard by Administrative Judge Segal.

APPEARANCES

Steven I. Bergel, Esq., for the employee
Timothy D. Zessin, Esq., for the self-insurer

CALLIOTTE, J. The self-insurer appeals from a decision ordering it to pay the employee § 34A temporary total incapacity benefits beginning on December 2, 2016. The self-insurer argues that the judge erred by crediting the testimony of the employee's vocational expert, and by failing to consider or analyze the employee's refusal to undergo surgery. We affirm the decision.

The employee, who was fifty-nine years old at the time of hearing, worked most of his life as a sheet metal worker, beginning in 1972 and ending in 2009.[1] (Dec. 3-4; Ex. 3.) For several years during that period, from 2001 through 2005, the employee ran a business with two partners in which he did sheet metal work, discussed hiring with his partners and made sure the bathrooms were clean and the trash was taken out. He did no accounting or bookkeeping. In 2005, he operated a franchise restaurant with his then wife, but his job was limited to purchasing items for the business and cleaning the premises. Again, he did no accounting, bookkeeping or other office work. In 2011, he began working for the employer as a laborer in the Water Department, repairing

[1] The employee graduated from a vocational high school in 1976, and became EPA certified in 2008, after completing a program at Baystate School of Technology, where he was trained in sheet metal HVAC. He has a CDL and a journeyman sheet metal license. (Dec. 3-4.)

roadways after water main breaks, and replacing hydrants and shut-off gates. This job required him to dig holes, use power saws, hammers, drills and jackhammers, load heavy equipment onto a dump truck, and drive the dump truck, "[a]ll manual labor stuff." (Dec. 4-5; Tr. I,[2] 14, 18.)

On February 11, 2013, and January 27, 2014, the employee suffered industrial injuries to his right dominant shoulder, the first when he was thrown into the windshield while an unrestrained passenger in a plow truck, and the second while jackhammering. An MRI after the first injury revealed degenerative changes at the right sternoclavicular joint. However, the employee was able to continue to work for approximately eleven months, until the jackhammering incident, when he experienced a marked increase in pain in his right shoulder. Following conservative treatment, the employee had surgery on March 30, 2015, and March 8, 2016. He has continued to experience pain, primarily in the sternoclavicular joint of his right shoulder, for which he takes Tylenol with codeine. (Dec. 5-6; Ex. 1.)

The self-insurer paid the employee both § 34 and § 35 benefits pursuant to a conference order, after which the parties entered into a Section 19 agreement whereby the self-insurer agreed to pay for the employee's first surgery of March 30, 2015, a period of §34 benefits for eight weeks thereafter, and ongoing § 35 benefits. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of board file). Subsequently, the employee filed the instant claim. A conference order issued requiring the self-insurer to pay for the upcoming second surgery, for § 34 benefits from the date of that surgery (March 6, 2016) for three months, and for ongoing § 35 benefits thereafter. That judge also allowed the joinder of the self-insurer's complaint to modify or discontinue benefits. Both parties appealed, and the matter was assigned to the current judge, who allowed the employee's motion to join a claim for § 34A permanent and total incapacity benefits. (Dec. 1-2.)

[2] The transcript of the first day of hearing held on September 8, 2017, is referred to as "Tr. I," and that of the second day of hearing held on April 12, 2018, is referenced as "Tr. II."

At hearing, the issues were disability and extent of incapacity, as well as causal relationship. The judge determined the December 2, 2016, § 11A report of Dr. Mark Gilligan was adequate and, thus, no other medical evidence was admitted. Dr. Gilligan diagnosed the employee with, 1) "right shoulder sternoclavicular joint dysfunction with underlying osteoarthritis status post resection arthroplasty"; and 2) "right shoulder AC joint dysfunction with impingement syndrome status post right shoulder arthroscopy." (Dec. 6.) He opined that the two work injuries exacerbated the employee's preexisting osteoarthritis in the sternoclavicular joint, and were a major cause of his ongoing symptoms, need for treatment and disability. Dr Gilligan further opined that the employee's medical treatment had been reasonable and necessary, and that a proposed third surgery in the form of a revision resection arthroplasty, followed by physical therapy would be reasonable. Dr. Gilligan opined the employee could not perform all his usual work activities but could return to work performing activities which did not require lifting or carrying of ten pounds or more with the right upper extremity, overhead lifting, or climbing. Dr. Gilligan believed these restrictions were permanent. The judge adopted these aspects of the § 11A opinion. (Dec. 7.)

The employee and the self-insurer each presented the report and testimony of a vocational expert. The judge adopted the opinion of Rhonda Jellenik, the employee's expert, that the employee had no transferable skills which would allow him to do any work in the open labor market. The judge specifically rejected the opinion of the self-insurer's vocational expert, Nancy Segreve, that the employee could perform work activities within the sedentary and light categories. (Dec. 8.)

The judge credited the employee's testimony that he has chronic and worsening pain, at the level of "eight to nine on a scale of one to ten." Whenever he moves his right arm, he experiences clicking and soreness within the joint, but he also has difficulty even sitting and standing because his shoulder tightens up and becomes uncomfortable. He cannot lift anything above his shoulder on the right and needs to use both hands to carry and pour a gallon of milk. His sleep is disrupted several times a night due to pain, and he is very tired during the day. He uses ice packs and/or heating pads daily. Finally, the

judge credited the employee's testimony that he could not perform any job as of the date of hearing. (Dec. 9-10; Tr. I, 54-55.) The judge concluded,

> Taking into account the Employee's physical limitations as outlined by Dr. Gilligan, and heretofore adopted, along with the Employee's credible complaints of pain and limitations, his age, education, work history and physical limitations, and Ms. Jellenik's opinion, as adopted, that the Employee is not vocationally suitable and is unable to perform remunerative work that is substantial and not of a trifling nature, I find the employee to be permanently and totally disabled from gainful employment as of December 2, 2016 to date and continuing.

(Dec. 11.)

On appeal, the self-insurer first argues that the judge erred by crediting the vocational opinion of Rhonda Jellenik because her conclusions were based on physical limitations beyond those assumed by Dr. Gilligan, the § 11A doctor.[3] Instead, the self-insurer contends, the judge should have adopted the opinion of its vocational expert, Nancy Segreve. We find no error.

Ms. Jellenik reviewed Dr. Gilligan's § 11A report, and based her opinion on his limitations, as well as on her interview with the employee. She concluded in her report:

> The transferable skills analysis shows that Mr. Ovalle has *no marketable transferable skills for sedentary or light employment.* The lifting limitation of 10 pounds would preclude light work. In addition, limitations with the dominant upper extremity would make sedentary and light work difficult due to the amount of reaching, handling and fingering tasks required in most positions . . . .

(Ex. 6; emphasis added.) The judge adopted the following testimony given by Ms. Jellenik:

> My determination was that his [the Employee's] work history has been intensive with lifting and using his upper extremities with – to reach, handle, grasp, use his hands requiring manual dexterity bilateral – bilaterally, and that he does not have the physical strength or that capacity anymore to transfer those skills to another

[3] The self-insurer cites the following specific complaints the employee made to Ms. Jellenik which it says were not referenced by Dr. Gilligan in his report: right-sided pain in bicep area when sitting; elbow pain with certain movements; constant numbness in his little finger and the adjacent finger; inability to lift anything with his right arm, difficulty holding a pen or pencil and grasping. (Self-insurer br. 15, citing Ex. 6.)

> work setting. So based on that, and the fact that he does not have any experience in working with the public and customer service and sales and estimation, his computer skills aren't marketable in the open labor market based on what he testified to and what he told me, so my determination was that there were no – given the entire picture, there were no vocational options for him in the open labor market.

(Dec. 8, quoting Tr. II, 10-11, and Ex. 6.) Later in her testimony when she was specifically asked whether her conclusion that he could not perform even a customer service job was based on problems with his fingers and his use of a computer and a phone, which he had told her about, Ms. Jellenik responded,

> It's based on my assessment of what skills he brings to the table to a potential employer. I don't believe he has the skills that potential employer[s] seeking to fill that position – I don't believe he has those skills that they are looking for. He doesn't have customer service skills. He doesn't have the computer skills. He doesn't have the background or the experience. As somebody who does job placement with injured workers, I don't think he'd be marketable with his background for a customer service or a dispatching job.

(Tr. II, 26.) Thus, Ms. Jellenik made it clear that she based her conclusion on the employee's vocational suitability for jobs categorized as either light or sedentary, including jobs such as working with the public, in customer service, in sales and estimation, and in computers. (Tr. II, 20-22.) In any event, we view the differences in Ms. Jellenik's assumptions of the employee's physical limitations, and those set forth by Dr. Gilligan, (see footnote 3, infra), all of which relate to the employee's right upper extremity, to be relatively insignificant, insofar as they affected Ms. Jellenik's vocational opinion.

The self-insurer argues, however, that the judge should have adopted Ms. Segreve's testimony that the employee could perform a variety of light and sedentary jobs. It maintains that the reasons the judge gave for rejecting that opinion were irrelevant, i.e., that Ms. Segreve did not interview the employee, and that she incorrectly reported the employee has a "hoisting and rigging license." (See Dec. 8.) There was no error. It is axiomatic that a judge has discretion to determine whether vocational testimony is helpful in reaching her decision. Martin v. Sunbridge Care and Rehab. for

Hadley, 22 Mass. Workers' Comp. Rep. 1, 5 (2008). She need not adopt vocational expert testimony or specify her reasons for rejecting that testimony or even discuss the expert's opinion in her subsidiary findings. Dillingham v. Brewer Petroleum Service, Inc., 32 Mass. Workers' Comp Rep. 147, 152 (2018), citing Sylva's Case, 46 Mass. App. Ct. 679, 681 (1999). Although the reasons stated by the judge may not have been determinative, the judge was free to reject Ms. Segreve's opinion and permissibly exercised her discretion to adopt the expert vocational opinion of Ms. Jellenik.[4]

We further note that the judge's own independent findings support her conclusion the employee is unsuited and unable to perform non-trifling work in the open labor market. It is well-established that the extent of the employee's ability to work is "not a purely medical judgment. It necessarily involve[s] evaluation of his occupational duties." Dalbec's Case, 69 Mass. App. Ct. 306, 315 (2007). Thus, although Dr. Gilligan opined the employee could return to some type of modified work which did not involve lifting or carrying of 10 pounds or more with his right upper extremity, overhead lifting or climbing, (Dec. 6-7; Ex. 1), that opinion can be overcome for a number of reasons. The "judge may give decisive weight to the credible testimony of the worker about his limitations." Dalbec's Case, 69 Mass. App. Ct. 306, 314 (2007), citing Scheffler's Case, 419 Mass. 251, 269 (1994). And she "may assign countervailing value to the worker's age, education, background, and prior employment history." Dalbec, supra, citing Scheffler, supra.

Here, there is no dispute that the employee cannot return to the type of heavy work he did with the employer, or to the sheet metal work he had done for most of his life before that. We infer from the judge's findings regarding the employee's duties during his two business ventures, that they did not enhance his skill level in any way that would

[4] We observe that Ms. Segreve's opinion was tainted by the fact that she based her opinion, in part, on unadmitted medical evidence, rather than solely on the prima facie report of Dr. Gilligan. (Dec. 8, citing Ex. 8.) See Carraturo v. Springfield Wire, Inc., 16 Mass. Workers' Comp. Rep. 214, 215-216 (2002)(judge did not err in excluding the testimony of a vocational expert who considered medical records not admitted at hearing, where § 11A was prima facie evidence).

make him employable in lighter work. (Dec. 5.) The judge credited the employee's complaints of pain and limitations, (Dec. 11), as she was permitted to do. See Dalbec's Case, supra; Andrews v. Southern Berkshire Janitorial Service, 16 Mass. Workers' Comp. Rep. 439, 442 (2002)("judge's findings regarding an employee's pain may permit a finding of total incapacity even where the medical testimony is that the employee is partially medically impaired"). She further permissibly credited the employee's testimony that he could not perform any job. (Dec. 10.) Thus, even though the judge did not make findings on some of the specific issues regarding the employee's right upper extremity mentioned by Ms. Jellenik, she "appropriately conducted a full, final, independent assessment," Dalbec, supra at 315, separate from her reliance on the expert vocational opinion of Ms. Jellenik, which supported her finding of permanent and total incapacity.

Next, the self-insurer contends that the judge erroneously failed to consider or analyze the employee's refusal to undergo a third surgery. The self-insurer acknowledges that an employee need not submit to a "risky operation" to be entitled to permanent incapacity benefits, see, e.g., Lauble's Case, 341 Mass. 520, 523 (1960), but points out that, although the employee testified that he did not want to have the surgery "because it's a very risky type of surgery," (Tr. I, 36), there is no medical evidence to support this statement. Moreover, the judge adopted Dr. Gilligan's opinion that, "it is reasonable for [the employee] to undergo revision resection arthroplasty which has been proposed by Dr. J.P. Warner," (Dec. 7), requiring the judge to address the issue.

Where the affirmative defense of "failure to mitigate" has been properly raised, it is generally a question of fact for the administrative judge to determine whether refusal to undergo surgery or other proposed treatment is reasonable. Chrigstrom v. Kenoza Vending Co., Inc., 32 Mass. Workers' Comp. Rep. 83, 83, 87-88 (2018), citing Snook's Case, 264 Mass. 92, 93 (1928), and Mooney v. New Boston Garden Corp., 2 Mass. Workers' Comp. Rep. 146, 147 (1988). Further, " 'When the evidence raises the question whether continuing disability is due to the original injury or to unreasonable refusal of proper treatment by the employee himself, the employee must prove that the

injury remains the cause.'" Chrigstrom, supra at 87, quoting from Burns' Case, 298 Mass. 78, 79 (1937).

Here, however, the insurer did not raise the affirmative defense of "failure to mitigate" by refusing a third surgery either at the commencement of hearing, or in its hearing memorandum, or verbally during testimony. (See Dec. 2; Ex. 4; Tr. I, 5-7.) Nor was the issue tried by consent. Cf., Chrigstrom, supra. The employee testified on direct examination that he had decided not to have further surgery because, "It would be extremely dangerous – even more dangerous than the first one. And he [Dr. Warner] would need a team of experts. And that would be no guarantee if he got in trouble, his words, hitting an artery." (Tr. I, 39.) The self-insurer neither objected to this testimony, nor questioned the employee on cross-examination regarding his decision to decline the proposed third surgery. The self-insurer did ask the employee on cross-examination about his *second* surgery of March 16, 2016, which was performed by Dr. Warner.[5] However, the self-insurer did not follow up by asking the employee any questions about, or even mentioning, the proposed surgery. (Tr. I, 79-80.) The first time the self-insurer attempted to raise this issue was in its closing argument, filed on the date the record closed, August 3, 2018. See Rizzo, supra. Even then, it cited only the employee's testimony on direct examination about the *second* surgery being risky. (Tr. I, 35-36.)

[5] The colloquy between the self-insurer's counsel and the employee was as follows:

> Q: And then the surgery – the second surgery took place in March of 2016; is that correct?
> A: Yes.
> Q: And that was performed by Dr. Warner?
> A: Yes
> Q: And that's the one you say was risky?
> A: Yes.
> Q: And how – so you didn't feel very – didn't help after. Didn't make your shoulder feel better after that surgery?
> A: No, it did not. And when I went back to the doctor and he did the tests and the MRIs and stuff, he basically confirmed what I was feeling.

(Tr. I, 79.)

Accordingly, we hold that the self-insurer waived the affirmative defense of failure to mitigate by failing to raise the issue at hearing. See Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001), quoting Wynn & Wynn, P.C. v. Massachusetts Commn. Against Discrimination, 431 Mass. 655, 674 (2000) (" 'Objections, issues, or claims – however meritorious – that have not been raised' below, are waived on appeal"). See also Doherty v. Union Hospital, 31 Mass. Workers' Comp. Rep. 195, 203 (2017)(affirmative defense of statute of limitations must be raised at hearing or it is waived); and, 452 Code Mass. Regs. § 1.11(3).[6] Furthermore, the self-insurer's attempt to raise the issue in its closing argument was "too little too late," Doherty, supra, to provide the employee with " 'fair notice of the grounds for its defense at hearing.' " Id. at 202, quoting from Bamihas v. Table Talk Pies, 9 Mass. Workers' Comp. Rep. 595, 597 (1995). Thus, the judge was not required to address the self-insurer's appellate argument of "failure to mitigate."

Accordingly, we affirm the decision. Pursuant to § 13A(6), the self-insurer shall pay a fee to employee's counsel in the amount of $1,705.66, plus necessary expenses.

So ordered.

Carol Calliotte

Carol Calliotte
Administrative Law Judge

[6] 452 Code Mass. Regs. § 1.11(3), provides, in relevant part:

> Before the taking of testimony in a hearing before an administrative judge, the insurer shall state clearly the grounds on which the insurer either has declined to pay compensation, or the grounds on which it seeks modification or discontinuance, provided that such statements are based on grounds and factual basis reported by the insurer or based on newly discovered evidence within the provisions of M.G.L. c. 152, §§ 7 and 8 and 452 CMR 1.00. On all other issues, the employee's rights under M.G.L. c. 152 shall be deemed to have been established.

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

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