COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 012536-13**

Michele Cote	Employee
Federal Express Corporation	Employer
Federal Express Corporation	Self-insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Koziol)

This case was heard by Administrative Judge Benoit.

APPEARANCES
Boaz Levin, Esq., for the employee
Mark Kelly, Esq., for the self-insurer at hearing
John J. Canniff, Esq., for the self-insurer on appeal

CALLIOTTE J. The self-insurer appeals from a decision ordering it to pay § 34 benefits to exhaustion, and § 35 benefits thereafter, as well as "reasonable and related medical expenses under § 13 and § 30." (Dec. 11.) We agree that recommittal is required.

On May 24, 2013, while working as a FedEx courier, the employee injured her left lower extremity when she stepped into a pothole as she was getting out of her truck. Aside from a brief period when the employee attempted to return to work, the self-insurer paid her §34 benefits through April 25, 2014, terminating them within the pay-without-prejudice period. (Dec. 4.) The employee's subsequent claim for further weekly benefits resulted in a conference order awarding her § 34 benefits from April 25, 2014, and continuing. The self-insurer appealed, and the case was heard on July 13, 2015, and September 11, 2015.[1] The self-insurer "accepted liability for the industrial accident that occurred on May 24, 2013," (Dec. 2), and, at hearing, challenged only extent of disability and earning capacity. (Dec. 1.) Dr. Ronald B. Etskovitz, a board certified podiatrist,

[1] The transcript of testimony from July 13, 2015, will be referred to as "Tr. I:" and the transcript of testimony from September 11, 2015, will be referred to as "Tr. II."

examined the employee, pursuant to § 11A, on November 25, 2014. His December 14, 2014, report and October 19, 2015, deposition testimony were admitted as evidence. (Dec. 3.) The judge found Dr. Etskovitz's report adequate, but "allowed the parties to submit medical records and reports concerning treatment or evaluation that had taken place, or would take place subsequent to the report of Dr. Etskovitz of December 14, 2014." Id. Both the employee and the self-insurer submitted additional medical evidence. Id.

The judge adopted the medical opinions of Dr. Etskovitz, who reviewed the opinions of the other physicians who had seen her, some of whom believed she had complex regional pain syndrome (CRPS), otherwise known as reflex sympathetic dystrophy (RSD), and some of whom did not. Her treatment consisted of extensive physical therapy and several nerve blocks, which provided varying levels of relief. (Dec. 4-5.) Dr. Etskovitz diagnosed the employee with "avulsion fracture of the lateral malleolus with left lateral ankle ligament tear/sprain, medial ankle sprain, and resultant chronic nerve pain syndrome somewhat consistent with complex regional pain syndrome but not a clinically classic presentation." (Dec. 6.) He had "no doubt her work-related injury caused this problem," id., and opined it prevented her from working in her prior job for the employer. Id. In his deposition, he opined that that there is not one specific test which could diagnose RSD or CRPS, that the diagnosis of RSD could be made without tests because "it's a relatively poorly understood mechanism," id., and that the employee does not have a classic presentation for RSD. Id.

In addition, the judge adopted the September 30, 2015, report of Dr. Roberto Feliz, who diagnosed the employee with CRPS; radiculopathy, lumbar region (left L5 radiculitis); sprain of sacroiliac joint, sequela; and sacroiliitis. His "clinical diagnosis" was "status post major left ankle sprain and avulsion fracture of the lateral malleolus" as well as post-injury neuropathy pain and signs of CRPS/RSD." (Dec. 7.) Based on criteria established by the International Association for the Study of Pain, he believed she did have CRPS. (Dec. 8.) He opined that the employee's work injury was the major cause of her ongoing pain, disability and need for pain management treatment. He felt

she was permanently restricted to walking less than 15 minutes, with no prolonged standing or climbing, and lifting less than ten pounds. (Dec. 8.)

The judge credited the employee's testimony that she had constant throbbing pain which caused her to wake between five and seven times per night. She took Tramadol, Gabapentin and Valium, which provided little relief but caused dizziness, drowsiness and shaking. She could no longer do many of the activities she did prior to the accident, and was anxious and depressed, for which she had been prescribed Lexapro. (Dec. 6-7.) Based on her severe pain, her inability to obtain meaningful rest, and the side effects of her medications, the judge found her unable to perform even sedentary work, and thus totally disabled at all times since her industrial injury. (Dec. 10.) Because the employee had not claimed § 34A benefits, the judge awarded her § 34 benefits from April 25, 2014, to exhaustion, and continuing § 35 benefits at the statutory maximum weekly compensation rate. In addition, he ordered the self-insurer to pay "reasonable and related medical expenses under § 13 and § 30." (Dec. 11.)

The self-insurer appeals, making several arguments. We summarily affirm the decision in response to the self-insurer's first argument that the impartial opinion does not support a finding of disability from the date of injury to the date of the impartial examination. However, we agree with the self-insurer on two points.

First, we agree that the judge erred by admitting additional medical evidence, where he specifically found the § 11A report adequate, and did not make a finding of medical complexity. The employee's motion to submit additional medical evidence was based on Dr. Etskovitz's recommendation that the employee be evaluated by a neurologist. The self-insurer objected to the employee's motion at the hearing on the ground that the judge had made no determination of inadequacy or medical complexity. (Tr. I, 5-6.) The judge responded that, he "did not believe that was the standard for the particular motion that was being raised."[2] (Tr. I, 6.) Accordingly, the judge allowed additional medical evidence for the "gap" period, which he defined as the period after the

[2] Neither party has indicated that the motion was in writing. Therefore, we rely only on the transcript for the positions of the parties and the judge.

examination by Dr. Etskovitz." (Tr. I, 6, 8.) However, in his decision, the judge specifically found the § 11A report adequate, and cited no other reason for the admission of additional medical evidence. (Dec. 3.)

Although the judge is correct that in certain circumstances, a gap period may include a period subsequent to the § 11A examination, Spencer v. JG MacLellan Concrete Co., 30 Mass. Workers' Comp. Rep. 145, 149-150 (2016), his belief that he was not required to first determine whether the impartial report was inadequate or the medical issues complex for a particular gap period was erroneous. As we have previously stated, the mere designation of a "gap period," either before or after the impartial report, does not necessarily justify the admission of additional medical evidence; a judge must do some analysis of the impartial medical opinion to reach the conclusion that gap medicals are necessary. Mims v. M.B.T.A., 18 Mass. Workers' Comp. Rep. 96, 98-99 n.1 (2004). For additional medical evidence to be admissible for a "gap period," the judge first must make a finding that the impartial opinion is inadequate or the medical issues complex for that time period, just as he would where additional medical evidence is allowed for all periods and purposes. See O'Brien's Case, 424 Mass. 16 (1996) (§ 11A expressly prohibits the introduction of other medical evidence unless the judge finds additional medical testimony is required due to the complexity of the medical issues or the inadequacy of the report). See Spencer, supra ("The whole idea of admitting 'gap medical evidence' is to address an inadequacy in an impartial medical examiner's report for a given timeframe");[3] Saia v. Grow Associates, Inc., 31 Mass. Workers' Comp. Rep. 45, 46 (2017)(judge's allowance of "gap" medicals for period of time before impartial report, indicated the report was inadequate to address that time period).

Here, not only did the judge fail to find the impartial opinion inadequate or the medical issues complex before allowing the parties to submit additional medical

[3] In Spencer, supra, we held that, although the judge did not make specific findings as to inadequacy or complexity, because he allowed the employee's written motion, based on inadequacy on the issue of present disability (i.e., staleness), and limited additional medical evidence to that period, "the judge's findings were clear on the record." Id. at 149. Here they were not.

evidence, he also specifically found that the impartial opinion *was* adequate. (Dec. 3.) Such essentially inconsistent findings cannot stand. See Sourdiffe v. U. of Mass./Amherst, 22 Mass. Workers' Comp. Rep. 319, 324-325 (2008)(internally inconsistent findings render decision arbitrary and capricious). Because the judge also adopted Dr. Feliz's opinion, the error is not harmless. Cf. Schwartz v. Massachusetts General Hospital, 16 Mass. Workers' Comp. Rep. 310 (2002)(athough judge erred by allowing additional medical evidence where he specifically found impartial report adequate and medical issues not complex, error was harmless because he relied only on impartial opinion).

We have disapproved a judge's actions in a similar scenario in Anzalone v. Mass. Water Resource Authy, 22 Mass. Workers' Comp. Rep. 291, 293-294 (2008). There, the judge declared the impartial report adequate, but admitted additional medical evidence "by virtue of the long-standing symptomology [sic] of the Employee's industrial low back injury . . . ." Id. We held that, the judge "left it to the reader to infer the ground upon which the admission of additional medical evidence has been authorized," and because more than one inference could be drawn from the judge's findings, we were unable to determine with reasonable certainty that correct rules of law had been applied. Id. at 294, citing Anderson's Case, 373 Mass. 813, 818 (1977)(parties entitled to clear and unambiguous statement of board's reasoning).

Accordingly, we recommit the case for the judge to make clear and consistent findings as to whether the impartial opinion is inadequate or the medical issues complex, either just for a "gap period," or for all periods and purposes. If the judge finds additional medical evidence is necessary for a "gap" period, he must specify what that period is (e.g., pre- or post-impartial examination), and indicate whether additional evidence is to be used for disability and extent thereof alone, or for causal relationship as well. See Villiard v. Rogers Insulation Specialist, 27 Mass. Workers' Comp. Rep. 1, 8-9 (2013)(when gap medicals are admitted to provide retrospective evidence of gap period, they may not be used for other medical issues such as present disability or causal relationship, without prior notice to parties). The judge should notify the parties of his

ruling prior to the issuance of his hearing decision to avoid any potential due process violation. See Schaeffer v. Philadelphia Sign Co., 25 Mass. Workers' Comp. Rep. 215, 221 (2011). "Otherwise the parties are in the dark as to what issues the medical experts should address." Berube v. Massachusetts Turnpike Authority, 12 Mass. Workers' Comp. Rep. 172, 175 (1998). See also Coggin's Case, 42 Mass. App. Ct. 584, 588 n. 7 (1997)(although not explicitly required by the statute or regulations, it is preferable for a judge "to articulate the basis for his conclusion" when ruling on a motion for additional medical evidence). The parties should then be allowed to submit additional medical evidence consistent with the judge's ruling.

The self-insurer also argues that the judge's order to pay for "reasonable and related medical expenses under § 13 and § 30," (Dec. 11), is too broad, and should be limited to the left leg and ankle. Where the employee has alleged that, as a result of the development of CRPS, her hip, back and right leg were affected by the initial injury to her left leg, the judge must be clear in his findings as to what body parts his order encompasses.[4] Although the self-insurer did not contest causation or payment of §§ 13 and 30 benefits at hearing, it is the employee's responsibility to prove every element of her claim, Sponatski's Case, 20 Mass. 526 (1915), including reasonableness and causal relationship of claimed medical care. In addition, the parties and this board must be able to understand what medical benefits the self-insurer is responsible for paying. Because the judge made no findings of fact indicating which body parts were encompassed by his order, we agree that recommittal is required for the judge to define the self-insurer's medical responsibilities. See Goodwin v. The Emporium, 28 Mass. Workers' Comp. Rep. 157, 162 (2014)(judge erred by ordering the insurer "to pay any and all causally

[4] At hearing, the employee testified, without objection, about pain in her hips, back and right leg. (Tr. I, 23-25.) Later, when the employee's attorney again attempted to question her regarding those body parts, the self-insurer objected, stating he was not sure the hip, back, and right leg were at issue. The judge responded, "They are to the extent that they may be affected by complex regional pain syndrome." (Tr. I, 40.) The employee then testified, without further objection, that she had received treatment for not only her left leg, foot and ankle, but for her hip, low back and right leg, which she said was covered by the self-insurer. (Tr. I, 42.)

related medical expenses," without resolving conflicts in the evidence regarding the number of episodes of pneumonia, when the incidents occurred, and what treatment corresponds to those incidents).

Accordingly, we vacate the decision and recommit the case for the judge to clarify his order of payment for §§ 13 and 30 benefits, as well as his rulings on inadequacy and complexity. Because that ruling may result in the parties seeking to submit additional medical evidence, the judge must give them the opportunity to do so, as defined by the parameters of his ruling.[5] Once he has done that, he must revisit his other findings of fact and rulings of law, as necessary.

So ordered.

Carol Calliotte
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: ***July 20, 2018***

[5] The self-insurer also argues the judge adopted irreconcilable medical opinions in that Dr. Etskovitz's opinion cannot be read to include CRPS/RSD, while Dr. Feliz clearly diagnosed the employee with that condition. Because this argument presumes additional medical evidence was allowed for causation and disability, it is premature for us to address it until the judge makes appropriate rulings on the admission of additional medical evidence.