COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 031674-11**
Michelle Ayotte	Employee
Lahey Clinic Hospital	Employer
Lahey Health System, Inc.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Levine, Horan and Koziol)

The case was heard by Administrative Judge Preston.

APPEARANCES
Carolina K. Tumminelli, Esq., for the employee
John C. White, Esq., for the self-insurer

LEVINE, J. The self-insurer appeals from an administrative judge's decision awarding the employee § 34A permanent and total incapacity benefits, and medical benefits pursuant to §§ 13 and 30 for low back injuries and a "secondary condition." (Dec. 8.) For the reasons that follow, we recommit the case to the judge for further proceedings consistent with this opinion.

The employee worked for the Lahey Clinic Hospital as a pathology cytology assistant. On November 28, 2011, she lifted a box and injured her back. (Dec. 4-5; Tr. 8.) After conservative treatment did not relieve her pain, the employee underwent surgery in 2012. Unfortunately, the pain continued, and she has not returned to work. (Dec. 5.)

The self-insurer accepted liability for the employee's injuries and paid § 34 weekly benefits. Both the self-insurer's complaint to modify/discontinue weekly compensation and the employee's § 34A claim were denied at conference. Both parties appealed. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 2 (2002)(we take notice of documents in the board file).

Dr. Ralph Wolf examined the employee pursuant to § 11A. In response to the employee's motion to admit additional medical evidence, (Ex. A), the judge found Dr.

Wolf's report to be adequate. However, the judge authorized additional medical evidence due to the complexity of the medical issues. (Dec. 3; Tr. 3-4.)

The hearing took place on December 8, 2014, and the judge's decision was filed on January 13, 2015. He denied the self-insurer's modification/discontinuance complaint and awarded the employee § 34A benefits from March 6, 2014, to date and continuing, and medical benefits for the employee's low back injuries and "secondary condition." (Dec. 8.)

On appeal, the self-insurer first contends that the judge erred by closing the record without notifying the parties and by issuing the decision before the self-insurer submitted its additional medical evidence. Its second contention is that the judge erred when he ordered it to pay for medical treatment for a "secondary condition" which was not claimed or supported by the evidence.

At the outset of the December 8, 2014 hearing, with respect to the allowance of additional medical evidence, the judge stated:

> I have marked for identification a motion submitted to me by the employee a while back, on 12/1/14, to question the adequacy and/or complexity of the medical exam by Dr. Wolf. I responded that the exam is adequate but because of the complexity I'm going to need more additional medical evidence from the parties. So that's authorized. And Mr. White [self-insurer's counsel] also, certainly, can furnish whatever he wishes.
>
> And to be very clear, either party can depose an opinioned witness in this matter, if they elect to do so. . . .
>
> *I'll close the record on receipt of medicals from Mr. White, and the parties' agreement or stipulation with respect to depositions*.

(Tr. 3-4; emphasis added.)[1]

The self-insurer asserts that, at its request, on January 5, 2015, Dr. Michael DiTullio examined the employee. It further asserts that it "received the report on January 29 but did not have the opportunity to file the report as the judge's decision

[1] The employee's additional medical evidence was admitted in evidence at the hearing. (Tr. 3.)

was filed on January 13." (Self-ins. br. 6.) The employee concedes that Dr. DiTullio's exam was scheduled for January 5, 2015. (Employee br. 11.) And the judge's decision lists no additional medical evidence from the self-insurer. (Dec. 2.)

"It is well settled that an administrative judge has broad discretion in setting procedure for matters assigned to his docket." Weitkunat, Jr. v. Springfield Muffler Co., 17 Mass. Workers' Comp. Rep. 252, 256 (2003). However, "[f]undamental requirements of due process entitle parties to a hearing at which they have an opportunity to present evidence, to examine their own witnesses, to cross-examine witnesses of other parties, to know what evidence is presented against them and to have an opportunity to rebut it, as well as to develop a record for meaningful appellate review." Anderson v. Lucent Techs., 21 Mass. Workers' Comp. Rep. 93, 95-96 (2007)(emphasis omitted), citing Casagrande v. Massachusetts Gen. Hosp., 15 Mass. Workers' Comp. Rep. 383, 386 (2001), citing Haley's Case, 356 Mass. 667 (1972). "A judge must be vigilant in assuring that the parties are timely apprised of all rulings to which they might respond, and a judge must consistently provide the parties with a reasonable opportunity to respond to any material change in circumstances. When such vigilance does not prevail, due process violations frequently – if not necessarily – result." Mayo v. Save On Wall Co., 19 Mass. Workers' Comp. Rep. 1, 4-5 (2005).

In the present circumstances, it is clear that the self-insurer was denied its right to due process. Despite stating at the hearing that he would close the record "on receipt of medicals from Mr. White, and the parties' agreement or stipulations with respect to depositions," (Tr. 2), the judge closed the record before either event occurred.[2] As a result, the self-insurer's medical evidence was not admitted in evidence or considered by the judge. The case must be recommitted. See Mayo, supra, at 4 (collecting cases).

[2] There is nothing in the record to indicate that the judge communicated this change in procedure to the parties. The employee effectively concedes this lack of communication. (Employee br. 3, 9.)

The self-insurer also argues that the judge erred by ordering medical bills paid for a "secondary condition" that is not identified or claimed. We agree. "The scope of the administrative judge's authority at a hearing is limited to deciding those issues in controversy." Hall v. Boston Park Plaza Hotel, 12 Mass. Workers' Comp. Rep. 188, 190 (1998).

The self-insurer contends that the "secondary condition" was for psychiatric injuries and that no claim was made or evidence presented to support any award for this medical condition. (Self-insurer br. 11.) The employee agrees that she did not make any claim for depression; she asserts that the judge was referring to issues involving her left leg and chronic pain. (Employee br. 12-13.)

"Decisions of members of the board shall set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision." G.L.c. 152, § 11B. Therefore, on recommittal, if the judge finds in favor of the employee, any order for medical benefits should clarify the meaning of "secondary condition," if it is applicable to an issue in controversy.

Accordingly, we vacate the decision and recommit the case for further proceedings and findings consistent with this opinion.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: **August 20, 2015**

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Catherine W. Koziol
Administrative Law Judge