COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 022132-13**
Muzeda Noel	Employee
Faulkner Hospital	Employer
Partners HealthCare System, Inc.	Self-Insurer

REVIEWING BOARD DECISION

(Judges Koziol, Calliotte and Long)

The case was heard by Administrative Judge Williams.

APPEARANCES

Steven R. Whitman, Esq., for the employee
Tamara Lee Ricciardone, Esq., for the self-insurer

KOZIOL, J. The self-insurer appeals from an October 14, 2016, decision finding it liable for a July 29, 2013, industrial injury and ordering it to pay the employee § 34 total incapacity benefits from August 11, 2013, and continuing. We vacate the decision and recommit the matter for further findings of fact.

At the time of the hearing, the employee was 46 years old. She immigrated to this country from Haiti in 1990, and is married with five children. She began working as a certified nursing assistant (CNA) in 1994, and worked as a CNA for the self-insured employer at all times relevant to this decision. In July of 2013, the employee and a registered nurse, Jackie Dejean, transferred a patient from a chair to a bed. After doing so, the employee reported to Ms. Dejean that she experienced pain in her lower back. The employee did not seek treatment for her back pain until August 11, 2013. (Dec. 6.) The judge found that some of the medical evidence indicates the date of injury was June 23, 2013, while other reports indicate the employee maintained that her injury happened on July 29, 2013. (Dec. 8.) The employee filed her claim asserting a July 23, 2013, date of injury. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(judicial notice taken of board file). .

In his decision, the judge credited the employee's testimony "as to the mechanism of injury as well as her recollection of the events relative to the date of injury." (Dec. 10.) The judge noted the self-insurer argued that July 23, 2013, should be the applicable date "for determination of these proceedings." (Dec. 10-11, n.1.) However, he expressly found that the employee and Ms. Dejean had "significant overlap in their time periods of work," and he also credited Ms. Dejean's testimony "regarding the employee's reporting of the injury." Id. He concluded, "[f]or those reasons the date of July 29, 2013 is the applicable date of injury." Id.

On appeal, the self-insurer first argues the judge's finding that the injury occurred on July 29, 2013, rather than July 23, 2013, was arbitrary and capricious. We disagree. The judge's findings are grounded in the evidence. (Tr. 10, 16, 45, 51, 74-75, 80.) "While there may have been evidence suggesting a different date of injury, it is fundamental that conflicts in the evidence requiring credibility assessments are for the judge to resolve. As long as the judge's findings are grounded in the evidence and reasonable inferences drawn therefrom, as they are here, we will not disturb them." Snyder v. Globe Newspaper Co., 26 Mass. Workers' Comp. Rep. 125, 129 (2012)(internal citation omitted).

The self-insurer also argues the judge erred by failing to make specific findings of fact pursuant to § 1(7A), Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 52-53 (2005), and, further, he mischaracterized the medical opinions he relied upon in this decision. We agree with both contentions, which require us to vacate the decision and recommit for further findings of fact.

In regard to the issue of § 1(7A), the judge made only the following findings:

> [A]s it pertains to the application of 1(7A) the employees [sic] prior breast reduction and degenerative changes, which were shown as a result of imaging after the alleged work injury, do not reach the threshold showing of a pre-existing condition for the application of a 1(7A) analysis.

(Dec. 10-11.) This statement fails to provide sufficient information for us to assess whether correct rules of law have been applied to facts that could be properly found.

Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 46-47 (1993). The lack of specific findings on the § 1(7A) issue stems in part from the judge's failure to resolve conflicts in the evidence regarding the precise nature of the employee's work-related injury. Thus, our ability to assess the propriety of the judge's § 1(7A) ruling is further impeded by the adoption of conflicting medical opinions which cannot be reconciled. These latter errors also infected the judge's disability and incapacity analysis.

The judge found the employee "sustained a personal injury arising out of and in the course of his [sic] employment on July 29, 2013 while attempting to assist a patient from falling." (Dec. 12.) However, he made no definitive findings regarding the nature of that injury, stating only, "I find the employee's L4-5 Low back injury to be causally related to the industrial injury." (Dec. 3.) He expressly stated that finding was based on his adoption of "that much of" the opinions of Dr. Oganeseov, Dr. Bley and Dr. Birkenfeld, as stated "there is a direct causal relationship between the work injury and Ms. Noel's low back injury." (Dec. 13.) In a footnote immediately following that finding, the judge stated:

> I acknowledge that Dr. Birkenfeld's opinion was a qualified opinion and Dr. Bley merely diagnosed a sprain/strain, but the diagnosis of Dr. Tannoury and the consistent diagnosis of Dr. Oganseov are quantitatively persuasive that the incidents of July 29, 2013 were responsible for the employee's medical condition and ongoing need for treatment.

(Dec. 13, n. 2.)

Thus, while expressly stating that he adopted the causal relationship opinions of Dr. Louis A. Bley and Dr. Ruben Oganesov, he also acknowledged that the diagnoses given by these doctors were not the same. Moreover, notwithstanding the judge's finding that Dr. Bley's March 1, 2014 report, "did not comment on the diagnostic testing that had been done," (Dec. 8), the report shows the contrary.[1] ([Self]-ins. Ex. 1.) Indeed, after

[1] Dr. Bley's March 1, 2014, report states,

discussing the findings of the MRI, Dr. Bley gave an opinion that separated the radicular symptoms from the employee's low back pain. Id. Dr. Bley causally related only a low back strain to the work-related incident occurring on July 29, 2013. (Dec. 8.) In addition, in his report of March 1, 2014, Dr. Bley opined that "Ms. Noel is at a medical end result for the work related low back strain of July 29, 2013," and she, "is back to her baseline, and any further treatment or disability would be due to her chronic low back pain." ([Self]-Ins. Ex. 1.) This opinion was given within the context of Dr. Bley, and the § 11A impartial medical examiner Dr. Ronald Birkenfeld, noting that the employee had degenerative changes in her spine.[2] "While the judge is free to adopt all, part or none of an expert's testimony, he is not free to mischaracterize it or fail to consider the entire record." Bernardo v. Hallsmith Sysco, 12 Mass. Workers' Comp. Rep. 397, 405 (1998). Dr. Oganesov, on the other hand, "initially diagnosed [the employee] with post traumatic lumbar radiculopathy with L5 nerve root impingement. He causally related her injury and need for treatment to the work related injury." (Dec. 8.)

The medical opinions adopted by the judge regarding the nature of the work-related injury sustained by the employee cannot be reconciled. This error was compounded by the judge's subsequent adoption of both Dr. Oganesov's and Dr. Bley's

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> She saw a neurologist October 31, 2013, complaining of radicular symptoms. She reported chronic low back pain, but over the last months radicular symptoms had greatly worsened, with shooting pains in the left lower extremity. She had received multiple medication trials and subsequently had an MRI. The MRI revealed an L4-5 herniated disc with a smaller one at L5-S1. There appeared to be some impaction on the traversing L5 nerve roots, both right and left. However, her symptoms are only left-sided.

([Self]-ins. Ex. 1.)

[2] Dr. Birkenfeld's report states, "[t]he formal [MRI] report indicates degenerative changes at L4-5 and S-1 in addition to a disc herniation at L4-5 left. (Statutory Ex. 1.) The self-insurer made an offer of proof regarding the § 1(7A) issue on the record at hearing, citing the § 11A report. (Tr. 6.) No argument was made on the record challenging the adequacy of the offer of proof or otherwise discussing the issue of § 1(7A), and the judge made no ruling at that time.

opinions regarding the extent of the employee's disability and her physical restrictions.[3] We cannot say that the adoption of inconsistent medical opinions was harmless as a matter of law.

Accordingly, we vacate the decision and recommit the matter for further findings of fact regarding the threshold issues of diagnoses and causal relationship, Kelly v. Boston University, 25 Mass. Workers' Comp. Rep. 143, 146-147 (2011), and for the performance of an analysis pursuant to Vieira v. D'Agostino Assocs., 19 Mass Workers' Comp. Rep. 50, 52-53 (2005).[4] In the event the judge finds that the employee has sustained a compensable injury that disables her, the judge must also make findings of fact and perform a proper incapacity analysis consistent with this opinion.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

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[3] The judge adopted Dr. Oganesov's opinion that the employee was "totally disabled and unable to engage in substantial gainful employment," and Dr. Bley's opinion that the employee "is at a maximum medical end point" and restricted from activity as follows: "no lifting greater than 5 to 10 pounds, no prolonged sitting without the ability to move or stand up essentially every hour or so and no standing greater that [sic] approximately 30 minutes at a time." (Dec. 8.) Because those physicians' causation opinions could not be reconciled, the judge erred in adopting both of their disability opinions as well. Sourdiffe v. University of Mass./Amherst, 22 Mass. Workers' Comp. Rep. 319, 324-325 (2008)(decision is internally inconsistent where incapacity determination is based on adoption of inconsistent opinion).

[4] The self-insurer also argues that the judge erroneously awarded § 34 benefits to be paid beyond the time frame allowed by statute. While it is true that the judge's October 14, 2016, hearing decision erroneously ordered the self-insurer to pay § 34 benefits from "August 11, 2013 to present and continuing," (Dec. 13), requiring the payment of § 34 benefits in excess of the three year time period allowed by statute, our decision vacating the decision renders this argument moot and requires no further action on our part.

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Martin J. Long
Administrative Law Judge

Filed: **September 18, 2017**