COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 018065-07**

Orbalina Vides	Employee
Charles Hotel	Employer
Zurich American Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Koziol and Calliotte)

The case was heard by Administrative Judge Solomon.

APPEARANCES
Peter Georgiou, Esq., for the employee at hearing
Christopher L. Maclachlan, Esq., for the employee on appeal
Donald M. Culgin, Esq., for the insurer at hearing
Jean S. Budrow, Esq., for the insurer at hearing and on appeal

HORAN, J. The insurer appeals from a decision denying its complaint to discontinue or modify the employee's § 34 benefits. One issue raised by the insurer requires us to recommit the case for further findings of fact.[1]

On June 30, 2007, while working as a "cook assistant,"[2] the employee suffered an injury to her "right dominant upper extremity."[3] (Dec. 3.) She was initially out of work for about six weeks. After returning to work, her pain increased, and she left work again. On January 10, 2011, "the employee underwent a surgical decompression of the radial ulnar [sic] nerve and right forearm and radial tunnel. . . ."

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[1] Accordingly, we do not address the other issues raised.

[2] "Her work for the employer included cutting up meat and poultry, mincing and dicing vegetables, and making pasta. Physically, her duties required constant standing, reaching and lifting approximately 40 to 50 pounds on a daily basis." (Dec. 3.)

[3] The employee's right hand came in contact with a mixing machine. (Dec. 3; Tr. 11.) Based on the employee's testimony, (Tr. 24), the judge also found that "she had had a similar incident at work affecting her right arm in 2005 and 2006." (Dec. 3.)

Id. Four months later she returned to work for about a week. The insurer accepted the case and paid the employee weekly § 34 benefits for her work-related incapacity.[4]

On June 15, 2011, the insurer filed a complaint to discontinue or modify the employee's compensation. The judge denied the insurer's complaint in a conference order filed on October 21, 2011. The insurer appealed.

Prior to the hearing, pursuant to § 11A(2), the employee was examined by Dr. Jeffrey Zilberfarb. (Dec. 2.) He authored a medical report and an addendum. (Dec. 1-2; Impartial Exs. 1 & 2.) He was also deposed. The employee's motion to submit additional medical evidence was denied. Therefore, at the hearing, only Dr. Zilberfarb's medical opinions were available to address the issues of the extent of the employee's disability, and its causal relationship to her industrial accident. (Dec. 2.)

In her decision, the judge credited the employee's testimony, and found that:

> The employee's January 2011 surgery helped somewhat, however her pain has persisted and "is always there". The employee presently experiences pain reaching from her neck to her right shoulder, arm and hand. She has very limited use of her right upper extremity. Her pain is constant and increases with most any activity she performs with her right arm. The employee takes Ibuprofen 3 or 4 times a day to alleviate her symptoms, however the medication provides only temporary relief.

(Dec. 3-4.) She adopted the opinions of Dr. Zilberfarb to conclude the employee suffered from a "right shoulder rotator cuff tear, radicular neck pain and status post-right radial tunnel syndrome [with] surgical decompression." (Dec. 4.) The judge also found, based on the doctor's deposition testimony, that the employee's work-related right shoulder injury limited her to "light duty work that did not involve any overhead work or lifting more than 5 pounds." (Dec. 4; Dep. 5-6.) Although the judge acknowledged the doctor did not attribute these restrictions to the employee's neck condition, (Dec. 4), she did not address squarely whether that condition was

[4] We take judicial notice of the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

work-related. This is important because the judge referred to the doctor's diagnosis of radicular neck pain, and credited the employee's complaints of pain, to support, at least in part, her decision to deny the insurer's complaint. (Dec. 5.) The employee's testimony concerning her pain was as follows:

> The pain, the pain that *starts in the neck*. It went on to my shoulder, it would go down to my right side, arm and hand, all the right-hand side.
>
> . . .
>
> Well, I feel that it [the pain] *begins from the neck* down.
>
> . . .
>
> It *goes from the neck* and down the arm, all the way down. . . .
>
> . . .
>
> It's a constant pain, night and day.

(Tr. 17-18; emphases added.) Later, when discussing the aftermath of her surgery, the employee testified that while "[t]he surgery helped a little bit . . . the pain never actually left." (Tr. 24.) The hearing transcript reveals nothing more about the source of the employee's pain.

Although the insurer conceded liability at the hearing, the parties did not stipulate to the nature of the employee's injury. On appeal, the insurer "contends that [it] paid for surgery to the radial nerve and right forearm and radial tunnel and denies causal relationship [of] the shoulder and neck."[5] (Ins. br. 12.) It argues the denial of its complaint was improperly based, in part, upon Dr. Zilberfarb's diagnosis of radicular neck pain, and the employee's testimony respecting that pain, because, in his addendum report following his deposition, the doctor opined the employee's neck condition was not work-related. (Impartial Ex. 2.)

We agree with the insurer that, on this record, the judge may not rely on the employee's radicular neck pain to deny the insurer's complaint. This is because the record is devoid of evidence supporting a causal relationship between the employee's

[5] The judge did not err in concluding the employee's shoulder injury was work-related. Although Dr. Zilberfarb opined the employee did not sustain a work-related injury to her neck, (Impartial Ex. 2), he did opine that her right rotator cuff tear and right radial tunnel syndrome were work-related. (Dep. 9.)

industrial accident and her neck condition. See Patient v. Harrington & Richardson, 9 Mass. Workers' Comp. Rep. 679, 683 (1995)(judge must assess employee's earning capacity without consideration of effects of non-work-related medical condition).

Accordingly, in order to ensure that the "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, 47 (1993), we recommit the case for further findings of fact consistent with this opinion and based on the record.

So ordered.

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Mark D. Horan
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **September 24, 2013**