COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 020513-17**

Patricia Jussaume	Employee
City of Lowell	Employer
City of Lowell	Self-insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Koziol and Long)

This case was heard by Administrative Judge Rosado.

APPEARANCES
Michael K. Landman, Esq., for the employee
Hannah Pappenheim, Esq., for the self-insurer at hearing
Adam R. LaGrassa, Esq., for the self-insurer on appeal

CALLIOTTE, J. Both parties appeal from a decision awarding the employee § 35 weekly partial incapacity benefits, as well as §§ 13 and 30 medical benefits, beginning on her last day of work, June 30, 2017, for damage to her vocal cords arising out of and in the course of her employment as a music teacher. The employee maintains that the judge erred by failing to award medical benefits beginning in the summer of 2010, when her problems with her vocal cords began at a work-related singing camp. We find no merit to this argument. The self-insurer argues that the judge erred by finding the employee provided adequate notice of her injury, and by excusing such failure of notice by finding that the employer/self-insurer had knowledge of the injury and was not prejudiced by any late notice. Although we agree that some of the judge's findings regarding the employer's knowledge of the employee's injury were misdirected and contrary to law, they were harmless error under the circumstances. Therefore, we affirm the decision.

The employee, age sixty-four at hearing, worked for the employer as a full-time music teacher and choral director for over twenty years, from 1997 until June 30, 2017. (Dec. 4, 8, 10; Tr. 6.) Her job required repetitive use of her voice, teaching music and

singing, for over seven hours per day. (Dec. 4.) The employee maintains that she first experienced discomfort and difficulty with her vocal cords in the summer of 2010, while attending a graduate choir course for music teachers, allegedly paid for by the employer, as part of her continuing professional education. The employee continued to work for the employer for approximately seven more years, during which time she had a number of different types of treatments designed to improve the symptoms and condition she was experiencing with her voice. (Dec. 5-7.) She left work on June 30, 2017. (Dec. 5.)

The procedural posture of the case is relevant to our decision, so we recite it in some detail. On or about August 28, 2017, the employee filed a claim for weekly and medical benefits, alleging she sustained an overuse vocal injury seven years earlier, on August 1, 2010, and claiming incapacity as of July 1, 2017. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of documents in board file). The self-insurer denied the claim based, *inter alia*, on lack of notice and late claim. Following a § 10A conference on January 9, 2018, the judge ordered the self-insurer to pay § 35 benefits from the date of the conference forward, along with §§ 13 and 30 medical benefits.

Subsequently, on or about January 19, 2018, the judge allowed the employee's motion to amend the date of injury from August 1, 2010, to her last day of work, June 30, 2017, on the grounds that each day she continued singing at work aggravated her original injury of August 1, 2010. (Dec. 2; Exh. B for identification, Employee Motion to Amend Date of Injury.) The insurer had opposed the motion on the grounds that the only injury report the employee ever filed was on August 9, 2017, for an injury occurring on or about August 1, 2010, and that she never notified the employer of any subsequent injuries.[1] Both parties appealed to hearing.

[1] On or about January 8, 2018, the self-insurer also filed a Motion to Dismiss the employee's claim, which the judge stated was denied by virtue of her allowance of the employee's motion to amend her claim. (Tr. 3.) The insurer's grounds for dismissal were stated as failure to comply with the notice and claim filing requirements of § 41, which prejudiced the insurer. (Ex. A for identification, Insurer Motion to Dismiss Claim.).

At hearing, the employee claimed § 35 partial incapacity benefits from June 30, 2017, to date and continuing, and "Sections 13 and 30 benefits, including outstanding bills." (Dec. 3.) The self-insurer raised causal relationship, proper notice, and proper claim and objected to the denial of its motion to dismiss. Id. The March 29, 2018, report of Dr. John R. Bogdasarian, the § 11A examiner, was the only medical evidence admitted, as no motions were presented challenging its adequacy, and the parties chose not to depose the impartial physician. (Dec. 2, 3.)

The judge found,

> In the summer of 2010, [the employee] attended a graduate choir course that was part of her continuing professional development/education needs. The Employer paid for her attendance at the class. It was at the end of this program that she first experienced some discomfort and difficulty with her vocal cords singing and speaking. Although she realized only some improvement thereafter and powered through with daily difficulty singing and speaking, she maintained her classroom schedule nonetheless. Regrettably the repetitive nature of her work culminated in her inability to continue singing and demonstrating good vocal technique to her students because of her damaged vocal cords, soreness and painful condition. She was not able to work beyond June 30, 2017.

(Dec. 5.)

The judge adopted Dr. Bogdasarian's opinion,

- That the July/August 2010 singing event was the initial cause of the [employee's] hoarseness and because of her acute laryngitis she developed compensatory muscle tension dysphonia which has now become a permanent condition.

- That the Employee's *continued work activities did aggravate her larynx causing muscle tension dysphonia*, and that muscle tension dysphonia is the major and predominant cause of her ongoing symptoms, not recreational singing.

- That the Employee's current disability was caused by the singing event July/August 2010 leading to acute laryngitis from which muscle tension dysphonia resulted from compensatory mechanism.

(Dec. 6; emphasis added.) Dr. Bogdasarian detailed some of the employee's treatment after the voice and singing camp where she "first experienced pain, discomfort and

changes to her voice." Id. That treatment, beginning in August or September of 2010, included, voice and speech therapy, three times, with ten sessions each time; suspension microlaryngoscopy surgery and continued speech therapy on November 11, 2014, without improvement; botox injections to her larynx to help with her "presumed spastic dysphonia" at the Mass Eye and Ear Infirmary in September 2016; another round of Botox injections administered at the Cleveland Clinic in July 2017. Id.

In her "Rulings of Law," the judge stated that the "self-insurer does not dispute that liability rests with the City for the Employee's claim of June 30, 2017." (Dec. 8.) Addressing the self-insurer's defense of late notice, the judge found, in essence, that failure to give written notice was excused by the employer's knowledge of her condition. She found that over the years the employee made known to her superiors her vocal condition and medical treatment protocol, and that the employer had knowledge of the employee's ongoing vocal issues, as she used medical sick time benefits to undergo treatment. (Dec. 7-8.) She concluded that "between 2010 and 2017 the Employee treated with four physicians for her vocal issues and informed her superiors, Ms. Conagen and Ms. Pena about her vocal struggles and incapacity to perform the tasks of a choral teacher." Id. The judge specifically found that the employee advised her principal she was flying to Cleveland Clinic for treatment. She also found that the insurer was "not prejudiced and when the Employee was no longer able to physically continue working because of her worsening condition and inability to effectively use her voice for singing or speaking, she immediately made it known to her principal." (Dec. 7.)

With respect to the self-insurer's four-year "statute of limitations defense," the judge found "the Employee sustained a repetitive workplace injury and continuously damaged her vocal cords through her work until she could no longer perform her duties as of June 30, 2017," when she filed her claim. (Dec. 10.) The judge thus concluded the statute of limitations did not bar the employee's claim. Id.

Based on the employee's credible testimony and Dr. Bogdasarian's adopted opinion, the judge found that, since June 30, 2017, the employee has been unable to

perform her work as a music teacher and choral director. (Dec. 8-9.) Her incapacity "is directly because of repetitive injuries sustained to her vocal cords beginning in 2010 at the seminar for music teachers/instructors," which the judge found was paid for by the City as part of the employee's ongoing professional training. (Dec. 9.) Again, based on the employee's credible testimony and the § 11A opinion, the judge concluded that the medical expenses incurred since June 30, 2017, were reasonable, necessary and directly related to the employee's work for the self-insurer. Accordingly, she ordered the self-insurer to pay medical benefits from June 30, 2017, and continuing, and § 35 weekly partial incapacity benefits beginning on the same date. (Dec. 10.)

The decision was filed on March 1, 2019. On or about March 11, 2019, the employee filed a "Motion for a Supplemental Order" asking the judge to award §§ 13 and 30 medical benefits from the date the employee sustained her initial injury in the summer of 2010, until June 30, 2017, when she left work, "as part of her entire repetitive injury complex." (Motion for a Supplemental Order); see Rizzo, supra. The self-insurer filed an opposition to that motion the following day, March 12, 2019. On March 25, 2019, and March 28, 2019, the self-insurer and employee, respectively, appealed the judge's hearing decision. Subsequently, on April 8, 2019, the judge deferred action on the motion until the reviewing board decided the appeal. Rizzo, supra.

On appeal, the employee argues only that the judge erred by failing to award §§ 13 and 30 medical benefits going back to her originally claimed date of injury, August 1, 2010, as argued in its Motion for a Supplemental Order. We first note that the judge was authorized to rule on the employee's motion, and should have done so, because the motion was filed within the appeal period to the reviewing board and prior to any appeals being filed. Cf. Davis v. P.A. Frisco, Inc., 18 Mass. Workers' Comp. Rep. 285, 287-288 (2004)(administrative judge does not retain jurisdiction of case after appeal filed, and reopening or reconsideration of the claim to render new order of benefits under those circumstances is contrary to law). However, we need not recommit the case for the judge

to rule on the motion because, as a matter of law, the employee is not entitled to those medical benefits.

The employee cites no legal basis for her argument that she is entitled to medical benefits for the seven years prior to her claimed date of injury. Rather, her argument "is one of reasonableness, based in equity, premised upon the fact that the judge found the initial injury to the employee to have occurred during the course and scope of her employment in the Summer of 2010, and that the impartial examiner found, . . . that there was a causal connection between the employee's attendance at a singing camp in July 2010 and the muscle tension dysphonia found on examination, . . ." (Employee br. 4; see OA Tr. 27-34.) However, August 1, 2010, is not the date of injury the employee alleged at hearing. Although she initially claimed a 2010 date of injury and pursued that claim until after conference, she then amended her claim, with the judge's permission on January 19, 2018, to allege a repetitive injury up to June 30, 2017, her last day of work. See Trombetta's Case, 1 Mass. App. Ct. 102, 105 (1973)(in repetitive or cumulative injury cases, the last day of work may be considered the date of injury, in the absence of other evidence establishing a more clear-cut date).

It goes without saying that an employee is not entitled to medical benefits (or any other benefits under chapter 152) for any period of time prior to suffering an injury. The fact that the alleged injury is a repetitive injury which she alleges began with (or before) the singing camp,[2] does not change this proposition. By amending her claim to state a date of injury in 2017, while seeking medical benefits back to an abandoned 2010 date of injury, the employee here is attempting to have her cake and eat it too. Not only is she pursuing a theory of her case that is not supported by her claim, but she is also seeking to obtain appellate review on a theory not advanced below. This she may not do. See Remillard v. TJX Companies, Inc., 27 Mass. Workers' Comp. Rep. 97, 103 (2013), citing

[2] At hearing, the employee testified that she did not believe her vocal condition was "because of the chorus camp in 2010," but rather it was a "contributing factor" which "the 20 years prior of teaching also contributed to. . . .." (Tr. 22.)

Commonwealth v. Head, 49 Mass. App. Ct. 492, 494 (2000). There was no error in the judge's failure to award medical benefits prior to the amended date of injury.[3]

We turn now to the self-insurer's arguments that the employee failed to give timely notice of her injury, or to prove the employer or insurer had knowledge of it, or was not prejudiced by lack of knowledge. The employee's amendment of her date of injury recognizes the difficulty she would have had in overcoming the notice requirement and four-year claims filing requirement of § 41, which were raised as affirmative defenses by the self-insurer. Had she maintained her 2010 date of injury, she would have had to prove that her claim was filed "within four years from the date the employee first became aware of the causal relationship between [her] *disability* and [her] employment." G.L. c. 152, § 41. Disability is distinct from incapacity to work, and may be the date the employee first seeks medical treatment, Sullivan's Case, 76 Mass. App. Ct. 26, 31-32 (2009). In the instant case, the employee appears to have sought treatment in August or September 2010, making it necessary for her to have filed her claim by sometime in 2014. In addition, pursuant to § 41, the employee would have been required to give notice of the injury "as soon as practicable after the happening thereof" in 2010.

However, the employee's amendment of her claim, after conference, to allege a later date of injury, appears to have created some confusion in the judge's analysis of the self-insurer's affirmative defenses of notice and claim, and in the self-insurer's arguments as well. Both the judge and the self-insurer focus primarily on the original 2010 injury date in addressing notice and claim. Indeed, it is not only the judge and the self-insurer

[3] Moreover, even if the employee had maintained her claim for a 2010 date of injury, she could not have succeeded in her claim for medical benefits going back to the summer of 2010. The employee's appellate brief recounts the treatment she received between August 2010 and July 2017, and states that she incurred out-of-pocket expenses of $7,000. (Employee br. 5.) However, she presented no expert medical evidence regarding the reasonableness, adequacy or causal relationship of her treatment during that time. Dr. Bogdasarian, whose report was the only medical evidence submitted, was not asked to address this issue, nor did he do so. Thus, the employee has failed to produce any evidence to support her entitlement to medical benefits prior to June 30, 2017. More basically, as discussed, *infra*, any claim for such benefits is inconsistent with her claimed date of injury.

who harken back to the 2010 date of injury, but the § 11A examiner as well, who seemed to assume the date of injury claimed was in 2010, because that was the date of injury listed on the conflict disclosure form sent to him by the Department, despite the fact that, by that time, the date of injury had been amended to 2017. (Exh. 1.) Nonetheless, Dr. Bogdasarian identified two distinct conditions causally related to the employee's work: acute laryngitis caused by the 2010 singing camp and muscle tension dysphonia attributable to her continuing repetitive work activities. (Exh. 1.)

The self-insurer's first argument is that the judge erred by finding the employee had given adequate notice of her injury. See G. L. c. 152, §§ 41, 44.[4] Correctly acknowledging that notice must be given "as soon as practicable" after the injury occurs, the self-insurer maintains that the employee became aware of her injury in August 2010, but did not give notice of it until the employee provided the employer with an injury report in August 2017. (Self-insurer br. 10.) However meritorious the self-insurer's argument may be with respect to the employee's failure to provide notice after a 2010 date of injury, it misses the mark for the same reason the employee's arguments do: the alleged date of injury is June 30, 2017, not August 1, 2010. The date of injury determines not only the date from which benefits are due, but also the date from which notice to the employer or insurer must be given. G. L. c. 152, §§ 41, 44. See also,

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[4] General Laws c. 152, § 41, states, in relevant part:

> No proceedings for compensation payable under this chapter shall be maintained unless a notice thereof shall have been given to the insurer or insured as soon as practicable after the happening thereof, and unless any claims for compensation due with respect to such injury is filed within four years from the date the employee first became aware of the causal relationship between his disability and his employment.

General Laws c. 152, § 44, states, in relevant part:

> Want of notice shall not bar proceedings, if it be shown that the insurer, insured or agent had knowledge of the injury, or if it is found that the insurer was not prejudiced by such want of notice.

Nason, Koziol and Wall, Workers' Compensation, § 9.10. (3rd ed. 2003). Here, any argument regarding notice should have used June 30, 2017, as its starting point.

The self-insurer then acknowledges that failure to give actual notice may be excused by supervisory knowledge of the injury. It correctly argues that the mere fact that the employee's supervisors (her principals) were generally aware of her problems with her vocal cords over the years is not enough to establish knowledge on the part of the employer, because knowledge means that they "knew or had reason to know the injury was causally related to the employment." Giaccarini v. United Parcel Service, 33 Mass. Workers' Comp. Rep. 195, 201-202 (2019), citing Kangas's Case, 382 Mass. 155 (1993), quoting Hamel v. Kidde Fenwal, Inc., 21 Mass. Workers' Comp. Rep. 127, 130-131 (2007). Further, the judge could not "infer employer knowledge of the causal connection between the employee's work activity and [her] alleged injury from either the repetitive nature of the work or the cumulative nature of the injury." Ladue v. C&S Wholesale Foods, 21 Mass. Workers' Comp. Rep. 233, 238 (2007). Thus, these findings on knowledge are not only based on the abandoned 2010 date of injury, but they do not establish that the employer had knowledge, within the meaning of the statute, because the judge did not find, nor did the evidence establish, that the employee's supervisors "knew or had reason to know" over the seven-year period discussed, that her vocal cord injury was causally related to her employment.[5]

Although all of the judge's findings on knowledge that address the abandoned 2010 date of injury are erroneous, they are harmless, because the judge made other findings based on the viable 2017 date of injury. The judge found:

> The City of Lowell was *not prejudiced* and when the Employee was *no longer able to physically continue working* because of her worsening condition and inability to effectively use her voice for singing or speaking, she immediately

[5] In fact, the employee even testified that she did not discuss the causal relationship of her vocal condition with her supervisors:

> Q: And aside from discussing your general difficulty with your vocal strain did you discuss the origins of that problem with your principal, either of them?
> A: No, I don't think so.

(Tr. 24.)

> made it known to her principal. . . . The employee filed an injury report with the City of Lowell in August 2017.

(Dec. 7; emphases added.) Thus, however briefly, the judge addressed both notice and prejudice with respect to the correct date of injury in 2017, finding, in effect, that the injury report filed in August 2017 was timely, and that the insurer was thus not prejudiced. See Giaccarini, supra at 11-12. A finding of no prejudice alone, even in the face of a finding of lack of notice or employer knowledge, will support a finding that the employee's claim is not barred by § 41.[6] See Fantasia's Case, 75 Mass. App. Ct. 655 (2009)(setting out ways in which insurer may generally be prejudiced). Although the judge did not address the factors determinative of prejudice discussed in Fantasia, we do not think she was required to do so in these circumstances. In Fantasia, the court held that the usual forms of prejudice to the insurer involve the inability to prevent or alleviate the employee's injury by having her medically examined and/or modifying her job, and the inability to conduct an investigation. Because here, the judge found the employee stopped working as of the date of her injury, June 30, 2017, and Dr. Bogdasarian opined that she had reached a medical end result by then, (Exh. 1), these forms of prejudice are inapplicable.[7]

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[6] Although there may be an issue as to whether the employee gave notice as soon as practicable after she left work on June 30, 2017, given that her claim was not amended to state that date of injury until Janurary19, 2018, the self-insurer has not made that argument. Therefore, there is no need to recommit the case for a determination on that issue. See McCarthy v. Peabody Properties, Inc., 29 Mass. Worker's Comp. Rep. 31, 40 (2015), citing 452 Code Mass. Regs. § 1.15(4)(a)(3) (reviewing board need not decide issues not argued in briefs). See also Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001)(issue waived if not presented to judge below).

[7] Although the employee's alleged failure to give notice of her 2010 injury as soon as practicable and the ensuing prejudice to the self-insurer, are the primary focus of the self-insurer's appeal, it also cursorily alleges the judge's finding the four-year statute of limitations did not bar the employee's claim is contrary to law. (Self-insurer br. 10, 12.) Because the four-year limitations period began to run on June 30, 2017, and the employee filed her claim no later than January 19, 2018, when the judge allowed the motion to amend the date of injury, the claim was clearly within the statute.

We note that the self-insurer's concession to liability does not negate its right to contest notice, knowledge and prejudice, which are affirmative defenses appropriately raised by the self-insurer, and which may bar the employee's claim, even if the self-insurer acknowledges that an injury occurred. At oral argument, when asked whether it was correct that the hearing memorandum indicated that the self-insurer was not disputing liability for the August 2017 date of injury, self-insurer counsel responded as follows:

> Attorney LaGrassa:: Yes, that's correct. I mean, she was a music teacher. She had an injury to her vocal cords. So certainly, her ongoing use of her vocal cords in the course of her employment, it would be a workplace injury. The central issue that the city is raising is the notice issue.
>
> Judge Long: Right. So you do accept liability for the most recent date of injury that she's alleged, which is the 2017?
>
> Attorney LaGrassa: Right, but I guess we do question the date of the injury. I understand that she's designated that as the date, but that's just the date that she finally determined that she was not able to work any further.

(OA Tr. 13-14.) To the extent the self-insurer challenges whether June 30, 2017, can properly be found to be the date of injury, we think the evidence supports the judge's findings that the employee suffered a repetitive injury up to her last day of work.[8] The judge adopted Dr. Bogdasarian's opinion that the employee's "*continued work activities* did *aggravate* her larynx causing muscle tension dysphonia," which "has now become a permanent condition." (Dec. 6.) The judge also adopted the employee's credible testimony,[9] (Dec. 9), and concluded that "the Employee sustained a repetitive workplace

[8] Although this is not a cumulative exposure case, the principles are similar. In Moran v. Signature Breads Inc., 25 Mass. Workers' Comp. Rep. 113 (2011), we observed that the general rule in cumulative exposure cases is that the date of injury is the first date of disability, and that the insurer on the risk at the time of the "last injurious exposure" to harmful foreign matter bears responsibility for payment of the employee's claim. Id. at 117 (citations omitted).

[9] The employee testified that, "it just kept getting worse." (Tr. 14.)

injury and continuously damaged her vocal cords through her work until she could no longer perform her duties as of June 30, 2017." (Dec. 10.) See Wilson's Case, 89 Mass. App. Ct. 398 (2016)(causal connection need not be shown by expert testimony alone, but may be supplemented by employee's credible testimony as to the nature and cause of her injury). We cannot say that the judge's findings that the employee's work activities continued to aggravate her condition up until the last day of work are arbitrary and capricious or contrary to law.

Accordingly, finding no merit in the employee's argument, we affirm the judge's generic award of medical benefits beginning on June 30, 2017. In addition, for the above reasons, we affirm the decision with respect to the self-insurer's arguments.

Pursuant to § 13A(6), the self-insurer is ordered to pay a fee to employee's counsel in the amount of $1,745.54.

So ordered.

Carol Calliotte
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Martin J. Long
Administrative Law Judge

Filed: ***December 29, 2020***