COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS

BOARD NO.: 039203-05

Pearlie Richardson	Employee
Chapin Center Genesis Health	Employer
American Zurich Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Koziol)

The case was heard by Administrative Judge Chivers.

APPEARANCES

Paul G. LaLonde, Esq., for the employee

James D. Chadwell, Esq., for the insurer

HORAN, J. The employee appeals from a decision awarding her a closed period of total incapacity benefits, raising issues relating to the judge's handling of her two post hearing motions. Because we cannot perform our appellate function without the benefit of a complete record and appropriate findings addressing the issues raised by the motions, we are compelled to recommit the case for reconstruction of the record, and for further findings of fact.[1] See, e.g., Nye v. Shaw's Supermarkets, Inc., 11 Mass. Workers' Comp. Rep. 221 (1997); Moronta v. Phillips Academy, 11 Mass. Workers' Comp. Rep. 318 (1997); Kelley v. Bethlehem Steel Corp., 11 Mass. Workers' Comp. Rep. 462 (1997).

On October 24, 2005, the employee, a certified nursing assistant, injured her left shoulder while assisting a patient. Following an award of benefits at conference, both parties appealed. Prior to hearing, the employee underwent a § 11A examination by Dr. Demosthenes Dasco. Dr. Dasco causally related the employee's pain and disability to her work injury. At hearing, the judge

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[1] In their briefs, and at oral argument, counsel for the employee and insurer were unable to agree concerning exactly what transpired at the "off the record" hearing on the motions. Because there are material differences in their recollections, recommittal is necessary. Cajigas v. United Cape Cod Cranberry Co., 2 Mass. Workers' Comp. Rep. 196, 198 (1988).

declared the medical issues complex, and both parties submitted additional medical evidence. (Dec. 2-4.)

Post hearing, the employee sought to depose Dr. Moskowitz, the insurer's medical expert, who had issued a twenty-four page report concluding the employee had no significant work restrictions as of January 11, 2007, the date of his examination. (Dec. 4.) When Dr. Moskowitz demanded a $2,500 deposition fee, the employee filed a motion to strike his report on the ground that his fee was unreasonably high, making the doctor constructively unavailable for cross-examination.[2] On March 12, 2007, a motion session was held off the record. The parties agree the judge orally denied the motion to strike Dr. Moskowitz's report. (Employee br. 9-10; Ins. br. 18-19.) Also post hearing, the employee filed a motion to compel the production of scheduling and payroll records to buttress her claim that, at the time of her injury, she was a full-time, rather than a per diem, employee.[3] The parties disagree about whether the judge heard the motion to compel.[4]

In his decision, the judge adopted Dr. Moskowitz's opinion, and found the employee's work-related left shoulder injury had totally incapacitated her until January 11, 2007. (Dec. 3, 4.) Addressing the issue of average weekly wage, the judge found that at the time of injury the employee worked per diem, rather than full-time. (Dec. 4, 5.) The judge awarded the employee § 34 benefits from November 2, 2005 until January 11, 2007. (Dec. 5.) The decision fails to mention the employee's motion to strike Dr. Moskowitz's report, or her motion to compel.

On appeal, the employee contends the judge erred by failing to conduct a hearing on the record, and to make findings regarding her motion to strike Dr. Moskowitz's report. We agree. We have repeatedly urged judges and practitioners alike to " 'conduct all but the most extraneous of trial business on the record.' " Hill v. Dunhill Staffing Systems, Inc., 16 Mass. Workers' Comp. Rep. 460, 462 (2002), quoting Murphy v. City of Boston (School Dep't), 4 Mass. Workers' Comp. Rep. 169, 173 n.8 (1990); see also Davis v. P.A. Frisco, Inc., 18 Mass. Workers' Comp. Rep.

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[2] See Employee's Motion to Strike, dated February 12, 2007.

[3] See Employee's Motion to Compel Production of Documents and to Supplement the Hearing Record with Said Documents, dated December 28, 2006.

[4] The insurer contends the employee withdrew her motion to compel at the March 12, 2007 motion session. (Ins. br. 7.) The employee maintains she did not withdraw the motion, but that the judge failed to address it. (Employee br. 27; Employee reply br. 2-3.)

285, 287 n.4 (2004). While not all rulings on motions require findings explaining the basis for the ruling, this one does. Cf. Kulisich v. Greater Lowell Family YMCA, 16 Mass. Workers' Comp. Rep. 270, 273 (2002)(judge not always obligated to make specific findings of fact when ruling on motion). Here, without specific findings, we cannot perform our appellate function and determine whether the correct rules of law were applied. See Bahr v. New England Patriots Football Club, Inc., 16 Mass. Workers' Comp. Rep. 248, 252 (2002); Praetz v. Factory Mut'l Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993); Antoine v. Pryotector, 7 Mass. Workers' Comp. Rep. 337, 341 (1993).

In ruling on the motion to strike, the judge must be mindful that the due process rights of the parties include the right to cross examine the opposing party's medical witnesses. See O'Brien's Case, 424 Mass. 16, 23 (1996); Haley's Case, 356 Mass. 678, 681 (1970); Begin's Case, 354 Mass. 594, 597-598 (1968); Gulino v. General Electric Co., 15 Mass. Workers' Comp. Rep. 378, 381 (2001)(judge's broad discretion in administration of his courtroom does not include authority to foreclose opportunity for parties to fully address medical issues by cross examining expert witnesses). The issue for the judge on recommittal is whether, under all the relevant circumstances, Dr. Moskowitz's $2,500 deposition fee is so unreasonable as to effectively deprive the employee of her cross examination right.[5]

[5] Both parties argue that the standard for determining whether Dr. Moskowitz was "constructively unavailable" is whether the fee he demanded is unreasonable. (Employee br. 18-23; Ins. br. 15.) We agree. For example, G. L. c. 152, § 11A(3), imposes a requirement of reasonableness on the deposition fee charged by the impartial examiner. However, we decline to adopt the employee's position that the fee approved by the commissioner for impartial depositions, currently $500, should be the sole gauge of reasonableness. (Employee br. 16, 21-22.) That is a factual determination for the judge to make, after consideration of the particular circumstances of the case. The judge should take into account other factors relevant to the reasonableness of the fee. See Linthicum v. Archambault, 379 Mass. 381, 390 (1979)(listing factors to be considered in determining amount of reasonable expert witness fees recoverable in a G. L. c. 93A action). Of particular significance in the judge's analysis is the time element. A $2,500 fee may qualify as reasonable if the deposition is anticipated to be an all day affair, whereas a $2,500 fee for less than an hour might be excessive. See also footnote 7, infra.

The employee also argues the judge erred by failing to rule on her motion to compel. See 452 Code Mass. Regs. §1.12(4).[6] Again, because the status conference was not on the record, and the judge did not issue a written ruling on the motion, we cannot address this issue presently. We therefore recommit the case for a hearing, findings and a ruling on the employee's motion to compel. Should the judge allow it, and permit the introduction of additional evidence, he must consider it and readdress the issue of average weekly wage. As always, the parties should be given notice of the judge's ruling before a new hearing decision is filed. Godinez v. Perkins Paper Co., Inc., 22 Mass. Workers' Comp. Rep. 83, 88 (2008).

Accordingly, we recommit the case for a hearing on the record regarding the employee's motion to strike Dr. Moskowitz's report,[7] with appropriate findings of fact; we also recommit the case for findings and a ruling on the employee's motion to compel. The judge may take additional testimony as necessary to enable him to address these issues and to file a decision anew.

So ordered.

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Mark D. Horan
Administrative Law Judge

[6] At the time of hearing, the regulation provided, in pertinent part, that "[o]n written motion . . . the administrative judge . . . may require . . . that any request for discovery . . . be complied with."

[7] If the judge determines the $2,500 fee is unreasonable, and the insurer is unwilling to pay the difference between what the judge finds to be a reasonable deposition fee (which is the employee's obligation to pay) and the higher amount sought by Dr. Moskowitz, the judge must safeguard the insurer's due process rights by allowing it to submit other medical evidence. See Murmes v. Gambro Health Care, 14 Mass. Workers' Comp. Rep. 13, 19 (2000). If, on the other hand, the judge determines the fee is reasonable, the employee should be given the opportunity to take the deposition of Dr. Moskowitz.

In either case, the judge must make further findings based on the evidence concerning the extent and duration of the employee's incapacity.

Catherine Watson Koziol
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

Filed: **July 21, 2009**