COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 038550-08**

Peter Bennett	Employee
Northeastern University	Employer
Northeastern University	Self-insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Calliotte[1])

The case was heard by Administrative Judge Preston.

APPEARANCES
John D. Hislop, Esq., for the employee
Joseph B. Bertrand, Esq., for the self-insurer

KOZIOL, J. Asserting multiple claims of error, the self-insurer appeals from a hearing decision ordering it to pay the employee § 34 temporary total incapacity benefits from August 25, 2008, until the exhaustion of those benefits on August 24, 2011, immediately followed by payment of § 34A permanent and total incapacity benefits from August 25, 2011 and continuing; medical benefits "for all respiratory treatment since August 25, 2008 occasioned as a result of the aggravation of the Employee's pre-existing asthmatic condition and any secondary condition that has occurred from the August 25, 2008 industrial event;" and, an enhanced attorney's fee in the amount of $22,000.00, awarded sua sponte pursuant to § 13A(5). The self-insurer asserts that the decision requires reversal. We agree.

The employee worked for Northeastern University from 2004 through 2008, first as an HVAC foreman, and later as a HVAC technician. (Tr. I, 12, 17-18.) At the time of the hearing, he was fifty-two years old. (Tr. I, 8.) The employee claimed he sustained a pulmonary injury arising out of and in the course

[1] Judge Levine, who served as an original panel member and was present at oral argument, retired from the reviewing board and no longer serves as an administrative law judge. Judge Calliotte served as a panel member in his absence and participated in panel discussions.

of his employment with the self-insured employer. Liability was not accepted by the self-insurer.

At conference, the judge awarded § 34 benefits from August 25, 2008 through August 24, 2011, followed by § 34A benefits from August 25, 2011 and continuing, but reserved any determination of the employee's claim for §§ 13 and 30 medical benefits for hearing. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). Both parties appealed.

Pursuant to § 11A(2), the employee was examined by Dr. Michael B. Zack. The judge found that the medical issues were complex and allowed the parties to submit additional medical evidence at hearing. The parties submitted additional medical records and reports, as well as the deposition testimony of Dr. Zack; Dr. Lela Caros, the employee's primary care physician; Dr. David M. Systrom, the employee's treating pulmonologist; and Dr. David C. Christiani, who examined the employee and consulted on his care as a result of a referral from Dr. Systrom. (Dec. 2.) The employee produced evidence presenting two theories of the case: 1) he has occupationally-aggravated asthma due to a single exposure to chemicals that were being used by other workers who were stripping the membrane of the shower floors in the women's locker room at the Marino Center gymnasium; and, 2) he has occupationally-aggravated asthma due to his own use of chemicals and solvents and his exposure to dust and fumes in his work environment as an HVAC technician.

The judge found that, "[o]n or about August 24, 2008 after working within days proximate to a womens [sic] locker room area where stripping chemicalswe re [sic] use[d], his ability to physically breathe and sustain further work was foreclosed. He no longer could function and required medical treatment and care and has b een [sic] unable to work since." (Dec. 5.) The judge concluded,

> I adopt the medical opinion of Dr. David Christiani and the credible testimony and history furnished by the Employee in concluding that the

> Employee's incapacity for any work since August 25, 2008 is the result of his exposure to toxic airborne chemicals at the workplace on or about August 24, 2008.
>
> The ultimate aggravating exposure to such respiratory irritants is the causal connection in aggravating the Employee's pre-existing breathing and physical conditions that put him out of the workplace totally and permanently, unable to earn a wage. He is hand cuffed by this catastrophic aggravation, now gasping to breathe and retain his strength and physically survive each day.
>
> The insurer did not raise the affirmative defense of Section 1(7A) before the hearing record closed notwithstanding it offers it in its closing argument. I conclude it was never properly raised and only 'as is' causal relationship is necessary. However, Dr. Christiani has addressed that appropriately if I am mistaken.

(Dec. 10.) The judge made the following rulings regarding disability:

> I rely on the credible testimony of the Employee and the dispositive testimony of Dr. Christiani in concluding that the Employee is incapable of any employment since August 25, 2008. I find that his documented exposures to toxic airborne chemicals has compounded his existing health issues and prevents him from any remunerative work and earn [sic] a wage from August 28, 2008 to the present and foreseeable future. He lacks the necessary physical capacity to perform the essential functions of his HVAC work, or any other work. There is no realistic likelihood that he will ever return to the workplace given the evidence I found at this hearing.

(Dec. 9-10.)

In his decision, the judge adopted opinions provided by Dr. Christiani to establish liability, causal relationship and disability. (Dec. 9-11.) To the extent the judge also adopted and relied on the opinions of Dr. Caros, we note that her opinions on the issues of causal relationship and disability rise and fall with those of Dr. Christiani because she repeatedly testified that she would defer to the opinions of Dr. Christiani, and Dr. Systrom, regarding both of those issues.[2] (Caros Dep. 62, 64, 72-74.)

[2] Dr. Systrom was the employee's treating pulmonologist who referred the employee to Dr. Christiani and who had treated the employee for asthma for "a number of years."

As the judge found, the self-insurer did not timely raise the issue of § 1(7A), and, as a result, the employee need only prove "as is" causation. Despite this lower standard of causation, the self-insurer argues the judge erred in awarding the employee any benefits because the employee failed to carry his burden of proving: 1) liability, i.e., that he sustained a work-related injury on August 24, 2008; 2) causal relationship; and, 3) disability and incapacity.

Regarding the employee's alleged exposure to chemicals used by other workers in the women's locker room at the Marino Center in August of 2008, the self-insurer contends the judge's decision does not resolve a primary factual issue in dispute in this case: the date of the employee's injury. At the hearing, the judge was presented with conflicting documentary and testimonial evidence concerning: 1) the date that the employee worked in proximity to the women's locker room where floor stripping was being performed; 2) the date the employee became ill; and, 3) the date the employee left work. The self-insurer argues the judge's failure to resolve these conflicts by making specific findings on each issue requires reversal of the decision because those findings are all critical to establishing any liability for the alleged aggravated condition, as each of these facts impacts the issue of "periodicity."[3] (Self-ins. br. 16-17.)

As the self-insurer indicated at oral argument, Dr. Christiani testified about the concept of "periodicity" and its bearing on his ability to render a reliable causal relationship opinion; specifically, "periodicity" limited his ability to reliably opine on causal relationship to instances where the appearance of symptoms falls within twenty-four hours of the exposure. (Oral Arg. 6-10; Christiani Dep. 16, 23, 68-69.) As such, the self-insurer contends that because the

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(Ex. 7, Chrisitiani report 12/09/08; Christiani Dep. 67-68.) The judge did not adopt any of Dr. Systrom's opinions in this case.

[3] Dr. Christiani defined "periodicity of symptoms" as, "[w]hen they occur, when they're better, when they're worse, the relationship to activity. That's periodicity." (Christiani Dep. 16.)

judge's findings fail to identify a date of exposure, a date of the onset of symptoms, or the date the employee sought treatment, they are insufficient to establish a date of injury.

We agree that the judge did not adequately address the conflicts in the evidence because he made no specific findings about the date of the alleged exposure and the events immediately following the exposure.[4] Ordinarily, we would recommit the matter for the judge to resolve the factual disputes in the record so that we could determine whether the proper rules of law had been applied by the judge. Hester v. City of Boston Public Health Commn., 29 Mass. Workers' Comp. Rep. ___ (8/25/2015); Praetz v. Factory Mut. Eng'g and Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). However, the self-insurer contends the evidence contains no set of facts which would be sufficient to support the employee's claim that he was injured by the stripping agents used by other workers in the women's locker room. We agree.

The self-insurer argues the employee failed to establish a factual foundation for Dr. Christiani's opinion that he was exposed to toluene and methyl ethyl ketone in the women's locker room, which caused an aggravation of his asthma. Specifically, the self-insurer argues the employee failed to introduce any evidence of an identifiable toxic chemical exposure in the workplace in August of 2008, and as such, his claim must fail as a matter of law. (Self-ins. br. 9.)

Dr. Christiani testified:

[4] The employee was not able to provide any testimony about the date of his alleged exposure in the locker room, or the date that he left work and sought treatment. (Tr. I, 80, 84, 85.) The employee's injury report and the paperwork filled out by the self-insurer indicated the date of injury was August 24, 2008, which was a Sunday. (Exs. 4, 5.) The employer's time records indicate the employee did not work on Sunday, August 24, 2008. (Ex. 9.) The self-insurer submitted a work order indicating the employee worked on the laundry vent at the Marino Center on August 20, 2008. (Ex. 6.) The employer's time records indicate that the employee worked three hours on August 25, 2008 and had to leave work because he was ill. (Ex. 9.) There is no evidence indicating what type of work the employee was performing during the three hours he worked on August 25, 2008.

Q: Do you recall Mr. Bennett describing any chemical that he worked with?

A: Yes.

Q: And what were those?

A: That he worked with or was exposed to that others were working with?

Q: Either/or.

A: Okay. So, he described using solvents such as toluene and being exposed to strippers that paint strippers were using. That wasn't his job, but he was in the area where stripping was being used that involved methyl ethyl ketone, or MEK, and toluene as I recall.

Q: And what's the significance of - - I'm going to use MEK if you don't mind - - MEK and toluene regarding asthma?

A: Well, they're volatile organic compounds that can in some people, cause irritation of the airways and can precipitate asthma. They're not specific asthma-causing agents themselves.

Q: But they could be in some people.

A: They could be, yes.

Q: Is that right?

A: That's correct.

(Christiani Dep. 9-10.) The self-insurer further questioned Dr. Christiani about an article he authored entitled "Asthma" which appeared in "APHA Preventing Occupational Disease and Injury."

Q : It indicates in the second paragraph that to confirm the presence of asthma you must establish a relationship with work exposures, is that correct?

A: Correct.

Q: Now, with Mr. Bennett, did you get anymore [sic] information about his work exposure outside of what he told you?

A: No.

Q: So, the only information you had was essentially his history that he gave you, is that correct?

A: Correct.

(Christiani Dep. 14-15.) At the hearing, the employee testified that he did not know what chemicals he was exposed to in the women's locker room. (Tr. I, 88.)[5] Yet Dr. Christiani testified his opinion was based solely on the information the employee gave him about that exposure. (Christiani Dep. 15, 52.) No evidence was introduced at hearing that the locker room workers were using MEK or toluene. Dr. Christiani was not asked, nor did he offer, any testimony that all solvents or strippers contain MEK or toluene, and there was no other evidence to that effect. There also was no evidence regarding the quantity, nature and duration of the employee's exposure and the employee's proximity to the alleged chemicals.

Consequently, Dr. Christiani's opinion lacked a foundation in the evidence to support the conclusion that the employee was injuriously exposed to those asthma-aggravating chemicals in the women's locker room in August 2008. Patterson v. Liberty Mutual Ins. Co., 48 Mass. App. Ct. 586, 596-597 (2000); Ciano v. Peterson Party Center, 23 Mass. Workers' Comp. Rep. 101, 105-106 (2009)(where causation opinion rests on information that is not within expert's personal knowledge or the admissible evidence in the record, it is not competent proof of causal relationship); Cf. Young's Case, 64 Mass. App. Ct. 903, 904-905 (2005)(physician's causation opinion competent proof of causal relationship where physician had personal experience working in emergency room, knowledge of protocols regarding disposal of needles and sharps, personal familiarity "with a risk common to hospitals," understood "the employee's job put her in contact with

[5] Hearings were conducted on two days. The transcript from the first day of hearing, January 16, 2014, is referred to as "Tr. I." The transcript from the second day of hearing, May 20, 2014, is referred to as "Tr. II."

potentially contaminated instruments," and he was able "to rule out other risks of infection"). Thus, the judge's finding that the employee was injured as a result of exposures to chemicals being used in the women's locker room in August of 2008, must be vacated.

The employee argues, however, the judge was not required to make such specific findings because the medical opinions adopted by the judge prove his second theory of injury: specifically, that the employee's ongoing exposures at work caused him to suffer from occupationally-aggravated asthma that disables him.

Regarding the second theory of injury, the self-insurer argues, as a threshold matter, the judge erred by making findings outside the stated issue framed by the parties at hearing: "did the employee sustain a claimed industrial accident on August 24, 2008." (Tr. I, 5.) The self-insurer asserts the judge went outside the parameters of the dispute by finding "the Employee had brief periods of absence from work from May 2008 to August 2008 because of the work related breathing problems." (Dec. 6; Self-ins. br. 2.) We agree that this finding exceeds the boundaries of the dispute agreed upon on the record, but the finding also must be vacated because it embodies a causal relationship opinion that has no mooring in the medical evidence.

The record shows that the employee testified about his job duties, (Tr. I, 30, 31, 35, 101; Tr. II 72-73), and a co-worker and his supervisor confirmed the employee worked with chemicals, solvents, lubricants, and cleaners consisting of coil cleaners and degreasers. (Tr. II, 103, 110, 122.) Dr. Christiani's deposition testimony however, unequivocally shows the history given to him by the employee alleged an injury caused by a *single* exposure to chemicals being used by other workers to strip the floors in the showers in the women's locker room area. (Chrisitiani Dep. 16-17, 18-19, 25, 28, 33-34, 49, 50-51, 70.) Indeed, when questioned about the employee's absences from work prior to August 25, 2008, Dr. Christiani testified the employee's breathing problems in April and May of

2008 were most likely asthma, triggered by allergic/sinus infections, (Christiani Dep. 26), and regarding his hospitalization in early June 2008, an "occupational exposure wouldn't be effecting [sic] his shortness of breath." (Christiani Dep. 31-32.) Accordingly, the judge's finding that the employee was briefly absent from work from May 2008 to August 2008, because he suffered from work related breathing problems, is vacated.

The judge found that the employee's "occupation is strenuous and exertional and requires working in or around areas where hazardous chemicals, solvents, gases, dust and other airborne airway irritants are present." (Dec. 5.) He also found the employee's breathing issues "surfaced while working in older campus buildings in 2007 and 2008. He was present often in areas where there was [sic] airborne chemical solvents, dust, smoke." (Dec. 5.) The judge's "Liability" finding shows he considered and found the employee proved his second theory of injury:

> I conclude from the credible testimony of the Employee and the cumulative evidence and consistent medical histories by the Employee and the supporting medical opinions referenced herein that indeed the Employee suffered injurious *workplace injuries in August 2008* arising out of and in the course of his employment by Northeastern University.

(Dec. 9; emphasis supplied.) However, as noted supra, Dr. Christiani's causation opinion and testimony that the employee had "work exposures" causing "occupationally-aggravated asthma" were limited to the one instance the employee told him about: the stripping incident in the women's locker room. (Christiani Dep. 15, 16, 18-19, 35, 33-34, 51-52.) Dr. Christiani was asked to assume that "oftentimes, Monday morning, his symptoms were significantly worsened when he was around these chemicals[6] and solvents he was regularly using. Assuming that to be true, would that be indicative of someone having occupational asthma?"

[6] The question is referring to MEK, toluene and toluene diisocyanate, (Christiani Dep. 49-50), for which there is no foundation in the evidence. Patterson v. Liberty Mutual Ins. Co., 48 Mass. App. Ct. 586, 596-597 (2000).

(Christiani Dep. 50.) The doctor answered, "well I just have what's in my notes, so if you want me to assume that, it means assuming a history that's not quite what I have in my notes." (Christiani Dep. 51.) The doctor never provided an affirmative answer to counsel's question. Moreover, Dr. Christiani testified that the employee "only focus[ed] on the one episode with the paint stripping" and that his record, "doesn't show any sort of chronic periodicity issues." (Christiani Dep. 17.)

We acknowledge that under the right set of facts, a judge may reasonably infer that work exposures worsened the employee's symptoms, causing a personal injury under the Act. However, here the facts are insufficient to support such an inference. Cf. Long's Case, 337 Mass. 517, 520-521 (1958)(injury may be inferred from medical opinion and facts found). When asked if he was "able ever to determine objectively what caused or what was involved in [the employee's] asthma," Dr. Christiani testified, "[w]ell, he's very complex. His asthma is what we would call multifactorial, that is, many factors caused his asthma." (Christiani Dep. 10.) He then identified the following factors: genetics, "he had many, many allergies that were documented on allergy testing to what we call common airborne allergens, pollens, grasses, trees. He had drug allergies, penicillin being one. So, he had many factors that could cause what we call a hypersensitivity syndrome with asthma and rhinitis." (Christiani Dep. 10-11.) He also testified to several other factors that could cause the employee's asthma including, gastrointestinal reflux disorder or GERD, seasonal allergies, being exposed to chemicals, and "possible sleep apnea." (Christiani Dep. 11-12.)

Dr. Christiani did not causally relate the employee's breathing difficulties in April, May and June of 2008 to the employee's work. There also was no evidence that the employee's job duties changed at any time during 2008. Considered in its totality and crediting the employee's testimony, the judge could not reasonably infer that it was more likely than not that the employee suffered an injurious work-related exposure in August of 2008, under the employee's second

theory of injury. Sponatski's Case, 220 Mass. 526, 528 (1915)("the [employee] must go further than simply to show a state of facts which is as equally consistent with no right to compensation as it is with such a right").

We note that even if the employee proved such an injury, the judge's disability and incapacity findings could not stand as they are based on opinions expressed by Dr. Christiani in his reports. (Dec. 8, 9-11; Ex. 7.) Dr. Christiani testified he did not feel that the employee was disabled in December of 2008, (Christiani Dep. 13, 38, 62, 68), and that his 2011 disability opinion was based on the combination of all of the employee's many physical illnesses,[7] not occupationally-aggravated asthma, (Christiani Dep. 34-35, 38-39, 68.) "The opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying." Perangelo's Case, 277 Mass. 59, 64 (1931).

Because our disposition moots the issue, we do not address the self-insurer's remaining claim of error concerning the judge's sua sponte award of an enhanced attorney's fee to the employee's counsel in the amount of $22,000. We reverse the judge's decision, vacate the benefit award, including the attorney's fee, and deny and dismiss the employee's claim.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

[7] The employee had back surgeries, knee surgeries, falls on ice, a seizure, a motor vehicle accident, gastrointestinal reflux disorder, multiple allergies, sinus problems, obstructive sleep apnea, and steroid-dependent asthma. (Christiani Dep. 12, 33, 39, 71.) Dr. Christiani did not causally relate any of those conditions to occupationally-aggravated asthma. (Christiani Dep. 71.)

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Carol Calliotte
Administrative Law Judge

Filed: **March 16, 2016**