COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOs. 037386-13 017989-14**

Raymond W. Jones	Employee
Energetic Lawn Care	Employer
Main Street America	Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant and Koziol)

The case was heard by Administrative Judge Rose.

APPEARANCES
J. Peri Campoli, Esq., for the employee
Alicia M. DelSignore, Esq., for the insurer

HARPIN, J. The employee and insurer cross-appeal from a decision awarding the employee § 35 benefits. We vacate the decision and recommit for further findings.

The fifty-seven year old employee suffered a work-related injury to his left shoulder on July 1, 2013, and a second work-related injury, this time to his back, on June 30, 2014. (Dec. 4.) The insurer voluntarily paid § 35 benefits to the employee until the date of the second injury, when it paid him § 34 benefits, without prejudice. (Employee br. 4-5; Insurer br. 1; Insurer Form 103) Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of Board file).

The insurer terminated the § 34 benefits on November 7, 2014, raising liability, disability, causal relationship, pre-existing injury, and non-occupational cause. (Form 106, dated October 28, 2014; Rizzo, supra.) The employee then filed claims for both dates of injury, seeking §§ 34 and 35 benefits, which were heard at a conference on March 11, 2015. The judge's conference order awarded benefits only for the employee's shoulder injury, while he denied benefits for the back injury. (Dec. 2; Conference Order of March 12, 2015; Employee br. 5.) The

judge ordered §35 benefits at a weekly rate of $885.96, based on the July 1, 2013, average weekly wage of $2,000.00,[1] from November 7, 2014, to March 11, 2015. He then reduced the employee's § 35 benefits to a rate of $600.00 per week beginning March 12, 2015, and continuing, based on an earning capacity of $1,000.00. (Dec. 2; Conference order of March 12, 2015; Rizzo, supra.) Both parties appealed. A § 11A examination was performed by Dr. Charles Kenney, whose report of June 6, 2015 was found to be adequate, but which covered only the employee's shoulder injury. (Dec. 1, 3; Ex. 4.) As a result, a second § 11A examination was held with Dr. Kurt Wieneke, covering the employee's back condition. However, the report of that examination was stricken, as it was determined at the hearing that the doctor had performed an IME on the employee for the insurer in the past. (Dec. 3; Ex. 5; Tr. 5.) The judge therefore allowed further medical evidence to be submitted on the employee's back injury. (Dec. 3; Tr. 5.)

At the hearing, the employee sought § 35 benefits for both the 2013 and 2014 dates of injury, beginning November 8, 2014, and continuing. (Dec. 2; Exs. 2 and 3.) In his Hearing Memorandum, for the June 30, 2014 date of injury, the employee also sought §§ 13 and 30 medical benefits for the "reasonable cost of shoulder surgery." (Ex. 1.) On the record at the hearing however, the judge stated that the employee sought such medical benefits only "generally," which he repeated in the decision. (Tr. 4; Dec. 2.)[2] The insurer, after stipulating to

[1] It is not clear how the judge arrived at this rate, as no earning capacity is listed on the order, and the maximum § 35 benefit for the given average weekly wage would have been $900.00.

[2] We consider that the employee's raising of the specific claim for surgery in his Hearing Memorandum was sufficient notice of his intention to seek such a treatment. Dellarusso v. Mass. Gen. Hospital, 25 Mass. Workers' Comp. Rep. 415, 417-418 (2011)(insurer's raising of § 1(7A) in its hearing memorandum sufficient to raise issue, even though issue not raised on the record at the hearing; judge's failure to consider issue was harmless, as adopted medical evidence did not support it). To the extent there were any discussions

industrial accidents on both dates of injury, questioned disability and its extent, causal relationship, and raised the issue of § 1(7A). (Dec. 2.) The judge adopted the opinion of the impartial physician that the employee was partially disabled as a result of his July 1, 2013, shoulder injury. He also found that the employee was at a medical end result from the shoulder injury, and "per the adopted opinions of Dr. Kenny, there is no need for any further medical treatment for the left shoulder." (Dec. 4, 5.) In regard to the employee's back injury, the judge adopted the opinion of Dr. Alan Inglis that the employee's "debilitating back pain" was causally related to the June 30, 2014, industrial injury, and that physical therapy and referral to a neurosurgeon were required. (Dec. 4.) The judge then awarded the employee § 35 benefits in the amount of $266.38 per week, based on an average weekly wage of $1,442.31 and an earning capacity of $1,000.00. (Dec. 5.) Both parties appeal.

The employee argues the judge erred in finding "there is no need for any further medical treatment for the left shoulder," based on the adopted opinions of Dr. Kenney. We agree. The judge adopted Dr. Kenney's opinion that "a medical end result had been reached," and concluded "there is no need for any further medical treatment for the left shoulder." (Dec. 4, 5; Ex. 4, 8.) However, contrary to the judge's conclusion that the shoulder did not need any further treatment, the doctor clearly wrote, "surgery to treat the left shoulder pathology would be reasonable, necessary, and causally related to the work-related incident of 7/1/2013." (Ex. 4, 7.)

It appears the judge equated a "medical end result" with a lack of need for further treatment.[3] However, such an interpretation of Dr. Kenny's "medical end

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about the discrepancy between the Memorandum and the decision, the judge must discuss that in his remanded decision.

[3] There does not appear to be any Massachusetts jurisprudence providing a specific definition for "medical end result." We recently noted that finding a medical end result did not preclude an award of payment for surgery, as long as there was a specific medical

result" opinion cannot be reconciled with the doctor's specific opinion that "surgery to treat the left shoulder pathology would be reasonable, necessary, and causally related to the work-related incident of 7/1/2013." (Ex. 4, 7.) The judge mischaracterized the doctor's opinion in holding that "[p]er the adopted opinions of Dr. Kenny, there is no need for any further medical treatment for the left shoulder." (Dec. 5.) The decision must therefore be recommitted to the judge to reevaluate the medical evidence, and make further findings on the employee's claim for future medical benefits. Lagrasso v. Olympic Delivery Service, Inc., 18 Mass. Workers' Comp. Rep. 48, 58 (2004)(judge is not free to mischaracterize opinion of medical expert).

The insurer, for its part, argues the judge erred in finding the employee's average weekly wage was $ 1,442.31, because he failed to support that finding with adequate subsidiary findings.[4]

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opinion addressing the reasonableness, adequacy, and causal relationship of the surgery to the industrial injury. Lupa v. United Parcel Service, 30 Mass. Workers' Comp. Rep. 27, 30 (2016)("[o]pining a 'medical end result' does not answer the question whether the requested surgery was warranted"), aff'd Lupa's Case, 91 Mass.App.Ct. 1103 (2017) (Memorandum and Order Pursuant to Rule 1:28).

[4] Mass. General Laws, c. 152, § (1) provides:

> "Average weekly wages", the earnings of the injured employee during the period of twelve calendar months immediately preceding the date of injury, divided by fifty-two; but if the injured employee lost more than two weeks' time during such period, the earnings for the remainder of such twelve calendar months shall be divided by the number of weeks remaining after the time so lost has been deducted. Where, by reason of the shortness of the time during which the employee has been in the employment of his employer or the nature or terms of the employment, it is impracticable to compute the average weekly wages, as above defined, regard may be had to the average weekly amount which, during the twelve months previous to the injury, was being earned by a person in the same grade employed at the same work by the same employer, or, if there is no person so employed, by a person in the same grade employed in the same class of employment and in the same district. In case the injured employee is employed in the concurrent service of more than one insured employer or self-insurer, his total earnings from the several insured employers and

In determining the average weekly wage the judge found that "[u]nder the so-called successive injury result, the most recent compensable injury remains responsible for any disability benefits, and guides the appropriate calculation under § 1(1)." (Dec. 4.) A "successive injury" is one "where an employee has suffered two or more compensable injuries, [and] the insurer covering the risk at the time of the more recent injury bearing a causal relation to the disability must pay the entire compensation." Faery v. Farren Care Center, 10 Mass. Workers' Comp. Rep. 697, 699 (1996). This is just another way of referring to the well-known "successive insurer" rule, which first arose in Evans' Case, 299 Mass. 435, 436-437 (1938). The rule applies even when there is only one insurer covering two separate and distinct injuries resulting in one period of incapacity. Home Indemnity Ins. Co. v. Merchants Distributors, Inc., 396 Mass. 103, 107 (1985). The judge was thus correct in attempting to determine the employee's average weekly wage based on the date of his last injury.

The judge "accept[ed] and adopt[ed] the weekly payments described in Exhibit 9 as to the employee's wages in the 52 weeks prior to his injury of June 30, 2014. I calculate the wages paid in the previous 52 weeks at $75,000, which renders an average weekly [sic] of $1442.31" (Dec. 4.) The insurer argues there were no findings of fact to support the judge's conclusion, especially given the conflicting documentary evidence providing weekly wage figures, thus recommittal is required for such findings. We agree.

The judge cited to Exhibit 9 as support for his finding, yet that exhibit does not reference weekly payments made to the employee, but consists only of the employee's 2012, 2013, and 2014 individual federal income tax returns, as well as

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> self-insurers shall be considered in determining his average weekly wages. Weeks in which the employee received less than five dollars in wages shall be considered time lost and shall be excluded in determining the average weekly wages; provided, however, that this exclusion shall not apply to employees whose normal working hours in the service of the employer are less than fifteen hours each week

the employer's S Corporation 2012 tax return. (Dec. 1; Ex. 9.) The weekly payments are found in Exhibits 6 and 10. The insurer argues that the tax returns for 2013 and 2014 are inconsistent with the weekly wages in Exhibits 6 and 10, and also do not support the average weekly wage found by the judge. (Insurer br. 6.)

Because the judge failed to support his finding on the employee's average weekly wage with subsidiary findings of fact, and his conclusion does not readily arise from the exhibits purporting to mathematically lead to it,[5] we are unable to "determine with reasonable certainty whether correct rules of law have been applied to facts that could be properly found." Arruda v. A. Vozzella and Sons, Inc., 32 Mass. Workers' Comp. Rep. ___ (August 23, 2018), quoting from Praetz v. Factory Mutual Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 46-47 (1993). On recommittal the judge must set out his methodology and subsidiary findings, with specific reference to the record, supporting his ultimate conclusion on the employee's average weekly wage. Arruda, supra. (case recommitted for judge "to adequately outline a cogent factual determination of the average weekly

[5] In Exhibits 6 and 10 the employee is listed as earning $40,000.00 from the week ending July 12, 2013, through December 25, 2013, and $27,000.00 from the week ending January 3, 2014, through July 3, 2014. The total earnings for that period were $67,000.00. The tax return for 2013 shows wages for the employee of $43,900.00. (Ex. 9, page 1 of attached Federal Statements.) A review of Exhibit 10 shows that the employee earned $8,200.00 from the employer in 2013 prior to the week ending July 12, 2013. Subtracting that amount from $43,900.00 gives wages from the date of injury to the end of the year of $35,700.00. The 2014 tax return shows earnings from the employer of $24,300.00. (Ex. 9, page 1of attached Federal Statements). There is thus a discrepancy between the weekly earnings shown in Exhibit 10 for the relevant period in 2013 of $40,000.00 and the earnings from the 2013 tax return for the same period of $35,700.00. Similarly, for 2014 the weekly earnings up to the date of injury are listed in Exhibit 10 as $27,000.00, yet the 2014 tax return shows $2,700.00 less. The total weekly earnings for the 52 week period prior to the date of injury, listed in Exhibit 10, are $67,000.00, and for the same period, from the two tax returns in Exhibit 9, are $62,700.00. Both of these numbers are obviously less than the $75,000.00 found by the judge to be the employee's wages for that period. (Dec. 4.)

wage pursuant to § 1(1)"); Hogan v. William Mascioli d/b/a Add-A Room, 25 Mass. Workers' Comp. Rep. 139, 141-142 (2011). If necessary, the judge may take additional evidence. Id., citing Varano's Case, 334 Mass. 153 (1956).

We find the remaining issue raised by the insurer to be without merit.

Pursuant to G. L. c. 152, § 13A(6), the insurer is directed to pay the employee's counsel a fee of $1,680.52.

So ordered.

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William C. Harpin
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: **October 31, 2018**