COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 018426-10**

Rita Dixon	Employee
Urban League of Eastern Massachusetts	Employer
National Union Fire Insurance	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Levine)

The case was heard by Administrative Judge Jacques.

APPEARANCES
William H. Murphy, Esq., for the employee at hearing
Paul M. Moretti, Esq., for the employee on appeal
Lori J. Harling, Esq., for the insurer at hearing and on appeal

KOZIOL, J. The employee appeals from an October 9, 2013 decision allowing the insurer's complaint to discontinue payment of § 34 temporary total incapacity benefits, as of July 15, 2011.[1] We affirm the decision.

[1] The judge noted that the case concerned the insurer's appeal from a § 10A conference order denying its complaint to discontinue the employee's benefits as of July 15, 2011. (Dec. 3.) Thereafter, however, the judge treated the case as though it concerned the employee's claim for weekly incapacity benefits, finding "the work related injuries had resolved prior to the claimed date of July 15, 2011" and ordering only "that the employee's claim be, and hereby is, denied and dismissed." (Dec. 9.) The parties do not take issue with the semantics of the order and their briefs make clear that they understood the judge to have allowed the insurer's complaint to discontinue benefits as of July 15, 2011. (Employee br. 3-4; Ins. br. 1.) Although the judge allowed the employee to join a claim for facet injections at the conference, and she ordered the insurer to provide that medical treatment, specific medical treatment was not an issue at the hearing. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). After completion of the lay testimony, but prior to the close of the evidence, the employee's § 34 benefits exhausted prompting the insurer to file a notice of termination of benefits as of July 15, 2013. Id. The judge later denied the employee's July 23, 2013 motion to join a claim for § 34A benefits. Id.

The employee, age eighty-three at the time of the hearing, has a Bachelor of Science degree in Human Services. For many years, she worked as a community resource liaison for the Department of Youth Services. She retired from that position, (Dec. 6), and subsequently, in June 2010, she began working as a clerical worker for the employer. (Dec. 7.)

On June 24, 2010, the employee slipped on a "throw rug" while searching for a file, and fell to the floor. (Dec. 7.) A co-worker helped her to a chair, where she rested for a period of time before resuming her work duties. Id. Thereafter, the employee continued to work. On July 2, 2010, the employee reported to the Beth Israel Hospital Emergency Room complaining of left hip, ankle and back pain; she was released after x-rays did not reveal any fractures. Id.

On July 19, 2010, the employee left work due to discomfort, and has not returned. Id. She visited the emergency room again on July 19, 2010, and July 21, 2010, complaining of ankle, hip and back pain. She was given a walking boot and was referred to Dr. Jeffrey Zilberfarb for treatment of her ankle and low back. Dr. Zilberfarb ordered an x-ray and prescribed physical therapy. Id.

On September 29, 2010, the employee began treatment with Dr. L. Douglas Dolgov, who continued to prescribe conservative treatment. (Dec. 7.) Almost a year later, Dr. Dolgov referred the employee to Dr. Sumon Nandi, an orthopedic surgeon at New England Baptist Hospital. (Dec. 7.) Dr. Nandi became concerned that an infection was present in the employee's left hip, where replacement equipment was installed in 1998. Id. Following aspirations of her left hip, the employee underwent surgery in December 2011, to remove the hip implant. In June, 2012, Dr. Nandi surgically replaced the employee's left hip implant. (Dec. 7.)

The employer accepted liability for the employee's right ankle sprain, back sprain/strain and left hip contusion, paying the employee § 34 temporary total incapacity benefits from July 19, 2010. (Dec. 6.) The insurer filed a complaint seeking to discontinue the employee's weekly benefits as of July 15, 2011, and appealed from the judge's denial of its complaint at conference. (Dec. 3.)

On December 3, 2012, the employee was examined by a § 11A impartial medical examiner, Dr. William Shea. (Dec. 1, 3.) Dr. Shea's report erroneously addressed the employee's right, rather than left, hip. Accordingly, the judge found his opinion to be inadequate regarding the left hip injury and allowed the parties to introduce additional evidence on that portion of the employee's claim. She also found the issues concerning the employee's back injury to be medically complex, authorizing the submission of additional medical evidence addressing that injury. (Dec. 3-4.) The judge found Dr. Shea's report to be adequate with regard to the employee's right ankle injury, denying the employee's motion to submit additional medical evidence pertaining thereto. (Dec. 4.) Later, the judge allowed the employee's motion to submit additional medical evidence to address the gap period, but denied the employee's motion for reconsideration of her ruling finding Dr. Shea's report to be adequate regarding the right ankle injury. (Dec. 4.) Both parties submitted additional medical evidence, including depositions of the insurer's independent medical examiner, Dr. Isadore Yablon, and employee's examining physician, Dr. Richard Fraser. (Dec. 1-2, 4-6.)

Relying on the medical opinions of Dr. Yablon and Dr. Shea, the judge determined the employee's work-related injuries had resolved prior to July 15, 2011. The judge also found that any medical difficulties experienced by the employee after July 15, 2011, were not causally related to the June 24, 2010 work accident. Based on these findings, the judge authorized the insurer to discontinue the employee's benefits as of July 15, 2011. (Dec. 8-9); See n.1 supra.

On appeal, the employee first argues the judge failed to address all of the issues in controversy because she failed to "render a decision on the employee's claimed hip injury," which was accepted by the insurer. (Employee br. 19-21.) The employee cites the following findings in support of her argument.

> The persuasive evidence demonstrates that the employee suffered a fall on June 24, 2010, which while clearly upsetting, had minimal physical impact on her. The employee was able to finish her work day and continued working for the next several weeks. The persuasive medical and diagnostic information support that she suffered a strain/sprain of her back and right ankle. Relying

> upon Dr. Yablon and Dr. Shea, I find that the work related injuries had resolved prior to the claimed date of July 15, 2011, and that any medical difficulties the employee continued to experience after that date are not causally related to the June 24, 1010 [sic], work accident.

(Dec. 8-9.)

While the cited excerpt lends surface appeal to the employee's argument, the argument lacks merit when considered in context of the decision as a whole. The record, and the facts found by the judge, show she did not fail to address all of the issues in controversy.

At hearing, the judge summarized liability as follows: "The insurer has accepted liability for the industrial accident on June 24, 2010. Accepted injuries are a right ankle sprain, back strain-sprain, and left hip contusion . . . [t]he employee doesn't agree that that's the extent of the injuries." (Tr. 4.)

Dr. Yablon examined the employee on three separate occasions, February 25, 2011, July 15, 2011 and May 17, 2013. (Dec. 8; Ex. 5 [a]-[c].). He noted, by way of history, the employee injured her left hip, back and right ankle but that he found her left hip "asymptomatic." (Dec. 8; Ex. 5[a]; Yablon Dep. 29, 36, 38, 68-69.) In his July 15, 2011 report and at his deposition, Dr. Yablon opined the employee's then present complaints were not causally related to the injuries sustained in the industrial accident. (Dec. 8; Yablon Dep. 18, 19, 21, 27, 28, 36, 38; Ex. 5[b].) He stated the employee had reached maximum medical improvement and that any pain or discomfort, along with any lifting restrictions, were related to degenerative arthritis, not the work injury. (Dec. 8; Yablon Dep. 18, 19, 27; Exs. 5[a]-[c].) Dr. Yablon was questioned extensively about the left hip, but he did not change his opinion. (Yablon Dep. 36-45; 54-58.) The judge was free to adopt Dr. Yablon's opinions. Kent v. Town of Scituate School Dept., 27 Mass. Workers' Comp. Rep. 195, 199 (2013), citing Schaeffer v. Philadelphia Sign Co., 25 Mass. Workers' Comp. rep. 215, 220 (2011); Ingalls' Case, 63 Mass. App. Ct. 901, 902 (2005); and Amon's Case, 315 Mass. 210, 214-215 (1943)(judge is free to adopt

one expert medical opinion over another so long as findings are sufficient to allow reviewing board to determine what medical evidence is relied upon).

Next, the employee argues the judge failed to consider all the evidence. (Employee br. 21.) The employee contends that certain reports of Dr. Richard Fraser, dated February 13, 2013 and July 12, 2013, as well as the June 10, 2013 report of Dr. Gerald Miley, were admitted in evidence, but were not listed as exhibits. The employee argues that because these reports were not discussed or referenced by the judge in the body of the decision, the employee's due process rights have been violated, requiring recommittal for consideration of this evidence. (Employee br. 21-22.) We disagree.

Failure to list an item as an exhibit does not automatically mean the item was not reviewed by the judge. The reports of Dr. Fraser and Dr. Miley, referred to by the employee, were introduced as exhibits during Dr. Fraser's deposition. (Fraser Dep. Exs. 4, 6, 7.) Dr. Fraser was examined regarding the contents of those reports. (Fraser Dep. 40-50, 58-61.) Dr. Yablon also was questioned about Dr. Miley's report of June 10, 2013. (Yablon Dep. 24, 59-64, 74-75.) In the body of her decision, the judge ruled on the objections presented at both depositions. (Dec. 5-6.) As such, we are confident she reviewed both depositions and their exhibits. See Keane v. McLean Hosp., 27 Mass. Workers' Comp. Rep. 9, 11 (2013)(discussion by doctor in his deposition of medical records presupposes knowledge by the judge of those records where judge refers to doctor's testimony in decision). In addition, the employee's closing argument referred to each of these reports and used the opinions expressed therein to support her claim. (Employee Closing Argument 3-5, 8.) The judge specifically stated that she considered the testimony, the exhibits, and the closing arguments of counsel. (Dec. 6.)

We have never required judges to list separately, exhibits that are attached to a deposition. Diano v. Mike Mack Corp., 1 Mass. Workers' Comp. Rep. 142, 143 (1987). Moreover, a judge need not comment on every single piece of evidence to ensure it was reviewed, but merely must identify and address those items of evidence that she finds persuasive or that she adopts. Kent, supra at 199. From our review of the decision, and the adopted medical opinion, there was ample evidentiary support for the

judge's findings. See Howze v. M.B.T.A., 25 Mass. Workers' Comp. Rep. 159, 161 (2011)(findings, including rational inferences, supported by evidence will be upheld unless different finding required by law). There was no error.

Lastly, the employee argues the judge erred by failing to allow her motion for a finding of inadequacy concerning the portion of Dr. Shea's report that addressed her right ankle injury. (Employee br. 24.) Dr. Shea sufficiently addressed the required aspects of that injury.[2] The judge found that after examining the employee on December 3, 2012,

> Dr. Shea opined that the employee's x-rays and MRI of the right foot were 'unremarkable' as was his examination of her right ankle. He opined that the employee has suffered a sprained ankle . . . as a result of her June 24, 2010 industrial accident. He opined that she had completely recovered from [that] injur[y] and [it is] 'in no way in causal relation to her present disability' (Exhibit #1).

(Dec. 8.) In regard to the right ankle injury, there was no material discrepancy between the facts found by the judge concerning the accident and its aftermath and those relied upon by Dr. Shea. (Dec. 6-7.) Having found Dr. Shea's report to be adequate regarding the right ankle injury, the judge properly adopted his medical opinion pertaining to that injury. (Dec. 8-9.) We find no error on this point.

The decision of the administrative judge is affirmed.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

[2] General Laws, c. 152, § 11A(2), reads in pertinent part:

> The report of the impartial medical examiner shall, where feasible, contain a determination of the following: (i) whether or not a disability exists, (ii) whether or not any disability is total or partial and permanent or temporary in nature, and (iii) whether or not within a reasonable degree of medical certainty any such disability has as its major or predominant contributing cause a personal injury arising out of and in the course of the employee's employment. Such report shall also indicate the examiner's opinion as to whether or not a medical end result has been reached and what permanent impairments or losses of function have been discovered, if any.

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Mark D. Horan
Administrative Law Judge

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Frederick E. Levine
Administrative Law Judge

Filed: **November 18, 2014**