COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 013203-15**

Robert C. Chrigstrom	Employee
Kenoza Vending Co., Inc.	Employer
Merchant's Mutual Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Calliotte and Long)

The case was heard by Administrative Judge Preston.

APPEARANCES
Joyce E. Scott, Esq., for the employee
Edward M. Moriarty, Jr., Esq., for the insurer

KOZIOL, J. The insurer appeals from a decision denying its complaint to modify or discontinue payment of the employee's § 34 temporary total incapacity benefits, and ordering it to pay the employee medical benefits "for the Employee's diagnosed right upper extremity and shoulder repairs" as well as § 34 benefits from May 22, 2015, to July 27, 2016, and § 34A benefits thereafter. (Dec. 9.) On appeal, the insurer raises one issue. It argues the judge erred in ordering "§ 34A benefits" because the judge failed "to make findings or otherwise address [the] insurer's properly raised failure to mitigate by refusing reasonable medical treatment defense." (Ins. br. 1.) The employee argues the insurer waived the issue by failing to properly raise the affirmative defense below. We agree that the insurer failed to raise the issue as an affirmative defense at any time prior to the hearing. Nonetheless, the hearing record shows the issue clearly was tried by consent, without objection by the employee. For the reasons that follow, we affirm in part and recommit for further findings of fact and rulings of law.

This right hand dominant, sixty-two year old employee is a high school graduate who performed repetitive manual labor over forty years, including over twenty years as a

vending machine route delivery driver. The judge made findings of fact describing the highly physical nature of the employee's job duties, which the parties agree included carrying heavy boxes of coins weighing up to 100 pounds. (Dec. 4; Ins. br. 2; Employee br. 3.) On May 22, 2015, the employee seriously injured his right upper extremity when he fell down five steps during work. Following the injury, the insurer commenced payment of § 34 benefits, and the employee has remained out of work. The judge found that as a result of the injury, the employee sustained a "fracture dislocation right elbow with radial head fracture, Essex Lopresti distal injury interosseous membrane and right radial ulnar joint right wrist injury, chronic right elbow and wrist pain with restricted ranges of motion." (Dec. 5.)

On March 28, 2016, the insurer filed a complaint to modify or discontinue the employee's § 34 benefits, accompanied by a January 22, 2016, medical report from its examining physician, Dr. Richard N. Warnock, who stated the employee could return to light duty work with restrictions on lifting. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(judicial notice taken of board file). On August 1, 2016, the judge allowed the employee's motion to join a claim for permanent and total incapacity benefits pursuant to § 34A, which was accompanied by the July 26, 2016, report of Dr. N. George Kasparyan. Id. On October 19, 2016, the insurer's complaint and the employee's joined claim proceeded to a § 10A conference, resulting in an October 21, 2016, conference order denying the insurer's request to modify or discontinue the employee's weekly benefits, and ordering the insurer to commence payment of § 34A benefits from July 28, 2016, and continuing.[1] The insurer appealed, and the employee was evaluated by a § 11A impartial medical examiner, Dr. Frank A. Graf, on February 15, 2017.

[1] At conference, the insurer submitted a new report from Dr. Warnock, dated October 7, 2016, stating in part, "radial head replacement would be indicated and is not unreasonable." Rizzo, supra. The insurer also submitted a written conference memorandum arguing the employee was capable of light duty work. Id. The insurer's memorandum did not argue that the employee's refusal to have treatment for his injury barred him from receiving benefits.

The matter proceeded to a de novo hearing where the insurer's Form 162 Hearing Memorandum raised the issues of causal relationship, disability and the extent thereof, and, ironically, denied entitlement to medical benefits under §§ 13 and 30.[2] (Dec. 1, Ex. 3.) At the commencement of the hearing, the judge recited the issues in dispute. (Tr. 4.) At no time did the insurer state that it was raising the employee's refusal to have surgery, or any other particular medical treatment, as grounds barring his entitlement to either § 34 or § 34A benefits.

The first indication of the insurer's intent to pursue this "failure to mitigate" defense was during employee's testimony. During direct examination, the employee's attorney asked the employee about the two surgical procedures recommended by his physicians, Dr. Scott A. Thompson and Dr. Jesse B. Jupiter. (Tr. 25-26, 30.) Employee's counsel also asked the employee about physical therapy and the medication he was taking. (Tr. 27-28, 35.) On cross-examination, insurer's counsel further questioned the employee about his doctors' recommendations regarding surgery, whether he had physical therapy, and whether he had taken opioid pain medication. (Tr. 44-46, 47, 51-52, 53.) At that time, the employee did not object to the insurer's questioning. At Dr. Graf's deposition, the insurer asked further questions about treatment recommendations that had been made to the employee, and the employee's decision not to go forward with those treatments, again without objection by the employee. (Dep. 24-32.)

[2] On appeal, the insurer implies that by denying causal relationship on its Form 162 Hearing Memorandum, and pursuing its questioning about the employee's refusal to undergo medical treatment, it properly raised the issue of failure to mitigate at hearing. (Ins. br. 5.) We disagree. First, the insurer overlooks the fact its argument does not correspond to its stance, also expressed on its Form 162 Hearing Memorandum, denying entitlement to medical benefits under §§ 13 and 30. (Dec. 2, Ex. 3.) Second, and more importantly, neither a judge nor an opposing party should have to guess what claims or defenses are being raised at the hearing or what the precise parameters of those claims and defenses are. This is especially true where the dispute resolution process is designed to narrow the issues in dispute, not expand them. Vallieres v. Charles Smith Steel, Inc., 23 Mass. Workers' Comp. Rep. 415, 418 ("clear legislative intent to establish a system which narrows the issues as litigants proceed through the dispute resolution process").

In its closing argument to the judge, the insurer raised the issue directly, arguing that its independent medical examiner, Dr. Warnock, opined the employee was "not at a medical end result" and "considered that a partial elbow replacement or resection would be appropriate treatment," and noting "that Dr. Jupiter, one of the employee's treating orthopedic surgeons, recommended such a surgery, radial head implant, in May 2016," and that the employee's other physician, "Dr. Kasparyan, also recommended surgery." (Dec. 2, Non-evidentiary Ex. B Ins. Closing Argument.) Regarding the issue in dispute on appeal, the insurer argued:

> Although clearly limited by his work-related right extremity impairment, the employee is not permanently and totally incapacitated. This work injury occurred not even two years and three months ago. The employee is not at a medical end result, and appropriate treatment could still assist in his regaining mobility and strength, and decrease his reported pain. The employee's refusal of treatment under these circumstances has been unreasonable, and should be a bar to sec. 34A entitlement. See Mooney v. New Boston Garden Corp., 2 Mass. Workers' Comp. Rep. 146, 147 (1988)("The issue of whether to undergo surgery was reasonable [sic] is one of fact.")
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> The employee should attempt light duty work, in any event, within Dr. Warnock's recommended restrictions. . . . The employee's decision to forego *any possible modality of treatment* to improve his situation cannot support an award of sec. 34A benefits.

(Dec. 2, Non-evidentiary Ex. B Ins. Closing Argument, 3-4; emphasis added.)

In his closing argument to the judge, the employee responded to the insurer's allegation, again without objecting and without arguing the waiver issue he now argues on appeal. Thus, the issue was clearly tried by consent. Opanasets v. Suffolk County Sheriff's Dept., 29 Mass. Workers' Comp. Rep. 53 (2015)(employee's failure to object to self-insurer's questioning of doctor on § 1[7A] defense and employee's closing argument to judge stating he satisfied his burden under § 1[7A], showed employee "effectively consented to trying the case under the § 1[7A] standard"). As a result, the judge needed to address the insurer's argument as framed. G. L. c. 152, § 11B(judge's decision must address all issues in controversy).

As the insurer's closing argument to the judge reflects, however, the problem with this case is that the insurer did not frame the issue with any specificity. The insurer's allegation that the employee acted unreasonably in refusing medical treatment vacillated from alleging his failure to agree to the radial head replacement surgery, which Dr. Kasparyan mentioned as a possible treatment, (Dec. 7), was unreasonable, to alleging that the employee's refusal to take prescription pain medications, receive therapy, and to have *any* of the recommended surgeries, all were unreasonable.[3] (Ins. br. 3-5.)

The insurer contends that § 34A benefits could not be awarded in this case because the cause of the employee's incapacity is his unreasonable refusal of certain medical treatment. "When the evidence raises the question whether continuing disability is due to the original injury or to unreasonable refusal of proper treatment by the employee himself, the employee must prove that the injury remains the cause." Burns' Case, 298 Mass. 78, 79 (1937).

> One who is entitled to compensation under . . . G. L. c. 152, cannot claim compensation for existing disability or suffering which can be lessened by resort to reasonable remedies and operations of the medical and surgical practice of the time and place if these are not attended with serious risk to life or member and if the outcome reasonably to be expected is beneficial. The test is not his willingness to submit to operation, but his right to guard life and limb from unreasonable peril. We have said in Floccher's Case, 221 Mass. 54, 55, 108 N.E. 1032, that if the claimant is not to be subjected to unusual risk and danger arising from the anaesthetic to be employed or from the nature of the proposed operation, it is the claimant's duty to submit, if it fairly appears that the result of such operation will be a substantial physical gain. Whether in a particular case there is such risk and danger, and whether it fairly appears that a substantial gain will result from a suggested surgical operation, are generally questions of fact to be determined by the Industrial Accident Board. Instances may occur when all the evidence is so clear that the decision presents merely a question of law.

[3] In addition, while the insurer framed its appellate argument as claiming error only with regard to the § 34A award, (Ins. br. 1), its brief goes on to state that in its closing argument to the judge, it argued the "employee's refusal of treatment has been unreasonable, and should be a bar to sec. 34 entitlement." (Ins. br. 1, 4.) The record does not support this last allegation as the insurer argued to the judge that the employee's alleged unreasonable refusal to have treatment barred only his entitlement to § 34A benefits; § 34 benefits were not mentioned by the insurer. Rizzo, supra.

Snook's Case, 264 Mass. 92, 93 (1928). Thus, "[t]he issue of whether refusal to undergo surgery [or another treatment modality] was reasonable is one of fact." Mooney v. New Boston Garden Corp., 2 Mass. Workers' Comp. Rep. 146, 147 (1988).

After reviewing the parties' submissions, including their written closing arguments to the judge, as well as the judge's decision, we believe the judge adequately addressed the insurer's argument insofar as the most recent suggested radial head replacement surgery is concerned. Indeed, the judge adopted Dr. Graf's opinion that "a medical end result has been reached and any further medical operative procedure is unlikely to give any benefit."[4] (Dec. 6; Ex. 1.) As a matter of law, this finding foreclosed the insurer's defense as it shows "the potential for substantial benefit from the proposed surgery [is] sufficiently doubtful." Smith v. Kingston Oil and Gas, 13 Mass. Workers' Comp. Rep. 203, 205 (1999).

Insofar as the employee's alleged refusals to undergo treatment are concerned, we note that the insurer's allegation and continued pursuit of its assertion that the employee refused to take prescription medication or undergo therapy for his injuries, lacks merit. As a threshold matter, the medical evidence in the hearing record is simply devoid of any support for the insurer's allegation that the employee has refused to take prescribed pain medication or to undergo prescribed therapy for his injuries, much less that, as a result of that refusal, the employee thereby contributed to his incapacity. This is because none of the medical records admitted at hearing mentioned a recommendation for use of prescription medication or an unfulfilled order of therapy for the employee's injuries.

The evidence regarding prescription pain medication was limited to the employee's testimony and Dr. Graf's response to questioning by the insurer's counsel. The employee testified:

[4] The record shows Dr. Graf was aware that the employee had not undergone surgery for his condition at any time prior to his § 11A examination. (Dep. 24-32; Dec. 2, Ex. 1[detailing medical treatment and recommendations].) Thus, we view his use of the word "further" in conjunction with his assessment of the employee's current status of being at a "medical end result," to be a reference to the more recent recommendations by Dr. Kasparyan and Dr. Warnock that the employee have the radial head replacement surgery previously recommended by Dr. Jupiter. Id.

> Q: Have you ever been offered any prescriptive medication for treatment of pain in connection with your right arm injury at any point in time?
> A: Yes, when I first left the hospital.
> Q: Do you recall what medication might have been provided to you by way of prescription for pain relief for your right arm condition at that time?
> A: I don't know what it was.
> Q: But you don't take any now and you haven't for awhile, any prescriptions?
> A: No. Prescriptions, no.
> Q: Have you heard of a class of drugs called opioids?
> A: Yes.
> Q: And have you ever been prescribed an opioid for pain relief to you [sic] knowledge at any point in time?
> A: I believe there was from the hospital an opioid.
> Q: And if I suggested that you might have been offered a prescription called OxyCodone with acetaminophen might that refresh your recollection as to if you were ever provided an opioid for pain relief, just if you remember.
> A: I don't remember.
> Q: No problem.

(Tr. 51-52.) Despite extensive questioning by insurer's counsel, Dr. Graf never suggested that the employee should be taking prescription pain medication. Rather, he testified that the employee's use of Aleve for his chronic pain was consistent with what he encourages his own patients to do, and that he never agreed with the use of opiates for chronic pain. (Dep. 32-35.) Thus, the hearing record supplies no evidence supporting the insurer's allegation that the employee "refused" to take prescription medications unreasonably, as there is no evidence that he was prescribed such medications and failed to take them in the first place.

The insurer's assertion that the employee refused to undergo prescribed therapy for his injuries is equally meritless. Under direct examination, the employee provided no testimony supporting the insurer's claim that he refused to undergo prescribed therapy.[5]

[5] The employee testified:

> Q: And did you pursue physical therapy?
> A: Yes.
> Q: At some point did you see another doctor besides Doctor Thompson?
> A: Yes. He left the office and they gave me Doctor Brady from the same office.
> Q: And did Doctor Brady continue conservative care with you?

The insurer's counsel's cross-examination also failed to produce any evidence supporting its contention.[6] The report of Dr. Graf states the employee underwent "multiple" occupational therapy and "hand therapy" sessions throughout the course of his treatment with Dr. Thompson and then with Dr. Brady. (Ex. 1.) There is nothing in Dr. Graf's deposition that supports the insurer's allegation the employee refused to undergo therapy that was recommended by his physicians.

Lastly, the insurer raised, and marginally preserved, the issue of the reasonableness of the employee's refusal to have surgery at any time since the accident. (Dep. 24-32; Non-evidentiary Ex. B Ins. Closing Argument, 4.) See Burns' Case, supra at 79("Commonly, refusal of a surgical operation is deemed unreasonable, if the

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A: Yes, for a couple visits.
Q: And what happened then?
A: He wanted to continue on with the physical therapy and the therapist was to the point she couldn't do anymore because of the extreme pain I was going through.
Q: What were you doing at physical therapy at that time that was causing so much pain?
A: She was trying to get me to bend the elbow and reach my back and reach my shoulder.
Q: And were you able to perform any of those motions?
A: No.
Q: And so it would be fair to say she seemed concerned to you about what was going on with your upper extremity?
A: Yes.
Q: And what did Doctor Brady decide to pursue at that point?
A: He wanted a CAT scan.

(Tr. 27-28.)

[6] On cross-examination, the employee testified:

Q: And you've undergone physical therapy to try to help, is that your testimony?
A: Yes.
Q: But your testimony is that actually that physical therapy activity actually not only provided no benefit but was also painful?
A: It did help. It got to swelling - -
Q: Okay. It provided some benefit but the PT never got you back to normal?
A: No.
Q: Okay. And presently you do not engage in any physical therapy, correct?
A: Yes.

(Tr. 47.)

operation involves no substantial danger to life or health and no extraordinary suffering, and if it fairly appears that substantial gain will result from submitting to it"). Although not complained of by the insurer, we note that the judge made certain findings that were not supported by evidence in the record. Specifically, the judge found the employee "sustained serious right upper extremity injuries from the May 22, 2015 industrial accident. *Multiple surgeries* to his right arm were necessary. He is left with significant physical restrictions and limitations." (Dec. 4-5; emphasis added.) Thus, the judge's findings indicate he was under the impression the employee actually had undergone prior surgery for his injuries, which he had not. These findings convince us that the judge did not conduct the proper fact finding and legal analysis about the earlier prescribed surgeries. On recommittal, the judge must make findings of fact and rulings of law as to whether the employee reasonably refused to have the earlier surgeries proposed respectively by Dr. Thompson and Dr. Jupiter.

Because the insurer challenged only the award of § 34A benefits, we vacate only so much of the hearing decision as ordered the insurer to pay § 34A benefits, and recommit the matter for further findings of fact and rulings of law regarding the employee's refusal to have the surgery suggested by Dr. Thompson and Dr. Jupiter. After making the necessary findings of fact, the judge must address the employee's incapacity from July 26, 2016, and continuing. While the matter is pending, we reinstate the conference order for the relevant timeframe, from July 26, 2016, and continuing. LaFleur v. Dept. of Corrections, 28 Mass. Workers' Comp. Rep. 179, 192 (2014).

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

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Martin J. Long
Administrative Law Judge

Filed: ***May 18, 2018***