COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 002033-93 033126-12**
Robin Outridge	Employee
M.C.I. Concord	Employer
Commonwealth of Massachusetts	Self-Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Calliotte)

The case was heard by Administrative Judge Preston.

APPEARANCES
Alfred E. Pearson, Esq., for the employee
Robin Borgstedt, Esq., for the self-insurer

KOZIOL, J. The self-insurer appeals from a decision awarding the employee § 34 benefits from June 5, 2013 and continuing, as well as medical expenses, pursuant to §§ 13 and 30, for "the diagnosed carpal tunnel syndrome surgeries and bilateral thumb CMC joint arthroplasty treatment." (Dec. 12.) The self-insurer claims the decision contains six errors that require reversal and a denial and dismissal of the employee's claim. We agree that the decision contains certain errors; however, those errors only require us to vacate the decision, reinstate the conference order, and recommit the matter for further findings of fact.

In 1987, the employee began to work for the self-insured employer as a Correction Officer I. (Dec. 5.) On January 14, 1993, the employee injured his right hand in a prison riot, returning to work after two to three months of conservative treatment. (Dec. 5.) The employee worked full duty until June 5, 2013, when he could no longer perform his work. As a result, he opted for regular retirement as of September 20, 2013. (Dec. 5.) The employee filed claims against the self-insurer asserting two dates of injury: January 14, 1993, and October 23,

2012. He sought incapacity and medical benefits for bilateral carpal tunnel syndrome and CMC joint arthritis. The self-insurer denied both claims.

Following a § 10A conference, the judge issued two orders. For the January 14, 1993 injury, the judge awarded no benefits but found that liability was established for an injury. For the October 23, 2012 injury, the judge ordered the insurer "to pay §§ 13 and 30 medical expenses for bilateral upper extremity treatment, to include all surgery and aftercare as directed by [the employee's] physician(s)" as well as § 34 benefits "from the date of surgery to thereafter up to 60 days maximum." See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permitting judicial notice of board file). Both parties appealed, and pursuant to § 11A(2), the employee was examined by Dr. Alan N. Ertel. See Rizzo, supra.

The judge addressed the employee's § 11A(2) motion to submit additional medical evidence at the hearing. (Tr. 3, 54.) Although the judge found Dr. Ertel's report was adequate, he found the medical issues were complex. (Tr. 54.)[1] Regarding the January 14, 1993 claim, the self-insurer denied liability,[2] disability and the extent thereof, causal relationship, entitlement to medical benefits and "Section 36 benefits." (Dec. 4.) Regarding the October 23, 2012 claim, it denied liability, raised defenses of proper notice and claim, contested causal relationship, raised § 1(7A), disability and the extent thereof, and denied entitlement to medical benefits. (Dec. 3.)

The judge determined that liability was established for the January 14, 1993 injury and, "from the persuasive dispositive medical evidence," he found "that an industrial injury[,] i.e.[,] an aggravation of an underlying condition occurred on October 23, 2012 as claimed." (Dec. 9-10.) The judge determined

[1] Subsequently, each party submitted additional medical evidence. (Exs. 4, 5.)

[2] Despite denying liability for an industrial injury occurring on January 14, 1993, the self-insurer stipulated, "that the employee suffered a torn collateral ligament of the right thumb in an industrial accident January 14, 1993." (Dec. 4.)

that the employee's left and right hand injuries "are causally related to the work place and that they resulted in total incapacity from work from June 5, 2013 to date and continuing." (Dec. 11.) He also determined the adopted medical opinions satisfied the employee's burden of proof regarding § 1(7A). (Dec. 12.) The judge found the employee is "incapable of performing his long term laborious work as a correction officer" and that "he is physically incapable of performing any modified work if such ever existed or if such was ever offered." (Dec. 10-11.) He further found that the "medical treatment to date, including the surgical procedures for carpal tunnel syndrome and CMC joint arthroplasty are reasonable, necessary and causally related to the Employee's employment." (Dec. 11.)

On appeal, the self-insurer asserts that the judge erred by: 1) failing to make any findings or rulings pertaining to its defense of lack of proper notice and claim regarding the October 23, 2012 date of injury; 2) finding that an injury occurred on October 23, 2012 either as a result of an aggravation or a new injury "when there was no evidence to support those findings;" 3) failing to make findings "as to how left thumb CMC joint arthritis can result from an aggravation of an injury to the right thumb MCP joint" and alleging there was "no expert evidence to support such a finding;" 4) performing an inadequate and incomplete vocational analysis pertaining to the extent of the employee's incapacity, which considered only the employee's ability to return to work as a correction officer; 5) failing to perform a proper § 1(7A) analysis; and, 6) failing to specify which of the two dates of injury served as the basis for his order of benefits. (Self-ins. br. 1-2.)

We address the first and second issues raised by the self-insurer because they are intertwined. The self-insurer claims there is no evidence in the record to support a finding that any injury occurred on October 23, 2012; therefore, the judge erred in concluding the employee suffered an injury on that date. (Self-ins. br. 8-11.)[3] The employee disputes the self-insurer's assertion that there was "no

[3] In making this argument, the self-insurer erroneously asserts that the decision fails to mention its motion to strike the opinion of the employee's examining physician, Dr. John

evidence" to support the judge's conclusion that the employee suffered an injury on October 23, 2012. (Employee br. 4-7, 8.) Because the decision contains no findings of fact even mentioning the October 23, 2012 date of injury, (Dec. 5-9), it provides an insufficient basis for us to determine whether the judge applied proper rules of law in finding that the employee suffered an injury on that date. Hester v. City of Boston Public Health Commn., 29 Mass. Workers' Comp. Rep. ___ (4/25/15); Praetz v. Factory Mut. Eng'g and Research, 7 Mass Workers' Comp. Rep. 45, 47 (1993). Accordingly, on recommittal, the judge must make further findings of fact pertaining to this issue.

In addition, the judge made no findings of fact and conducted no analysis pertaining to the self-insurer's duly raised defenses of proper notice and claim for the October 23, 2012 date of injury. "The self-insurer is entitled to a decision which addresses all of the issues in controversy with sufficient clarity to allow the reviewing board to decide whether the fact-finding is sound and untainted by error of law." Lafleur v. M.C.I. Shirley, 24 Mass. Workers' Comp. Rep. 301, 305 (2012), citing, Ballard's Case, 13 Mass. App. Ct. 1068, 1069 (1982). The failure to do so requires us to vacate the award and recommit the matter for further findings of fact and rulings of law pertaining to this defense. Comeau v. Enterprise Electronics, Inc., 26 Mass. Workers' Comp. Rep. 229, 244 (2012).

Davis. (Self-ins. br. 9.) The decision lists the motion as Exhibit "C" for identification. (Dec. 2.) We observe that the motion to strike asserted that Dr. Davis was not competent to testify as an expert in this case. The motion, based on the Doctor's testimony, was not made at any time during the deposition, and was not presented to the judge until the day the self-insurer filed its written closing argument. Rizzo, supra. We see no error in the judge's denial of that motion. The self-insurer also takes issue with the judge's failure to rule on the parties' objections made during Dr. Davis's deposition. (Self-ins. br. 9 n. 32.) The decision does not indicate whether the judge ruled on the objections. We note however, that of the eight objections registered during the Doctor's deposition, only three provided any grounds for the objection. 452 Code Mass. Regs. § 1.12(6)("All objections to questions and all motions relevant to testimony shall be set forth with particularity, and with the reasons in support thereof, and no administrative judge shall be required to rule on any objection or motion unless such reasons or statements have been made.") On recommittal, the judge should state his rulings on those objections.

Because recommittal is required to address threshold matters pertaining to the October 23, 2012 date of injury, we do not address the self-insurer's other claims of error. On recommittal, the judge may consider the self-insurer's remaining arguments pertaining to the issues it raised on appeal. Accordingly, the decision is vacated and the matter is recommitted for further findings of fact consistent with this opinion. In the interim, the conference orders are reinstated. Lafleur v. M.C.I. Shirley, 28 Mass. Workers' Comp. Rep. 179 (2014).

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: ***September 21, 2015***