COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 037143-11**

Roger Bereshny	Employee
General Electric Company	Employer
General Electric Company	Self-Insurer

REVIEWING BOARD DECISION
(Judges Long, Harpin and Calliotte)

This case was heard by Administrative Judge Bean.

APPEARANCES
Ronald D. Malloy, Esq., for the employee
Marianne Swenson, Esq., for the insurer at hearing
Paul Moretti, Esq., for the insurer on appeal

LONG, J. The employee appeals from a decision dismissing his § 30 claim for payment of a left total hip replacement. We affirm the decision.

The employee worked for General Electric beginning in 1980, initially as a machine operator, and then as an x-ray technician, the position he held on the date of injury, May 31, 2011. (Dec. 642.) On that date, the employee was injured when a revolving door struck his left knee, causing him to fall and strike his left side. (Dec. 643.) The employee treated with two doctors, one for his knees and the other for his left hip. He underwent surgery on both knees and received weekly indemnity benefits during his recovery period. (Dec. 643.)

The employee filed a claim, which the insurer rejected, alleging that a proposed left total hip replacement surgery was causally related to the May 31, 2011, injury. The claim was denied by the administrative judge at a §10A conference, and the employee appealed. On April 29, 2013, the employee was examined by an impartial physician, Dr. Joseph Abate, whose report and deposition testimony were admitted as exhibits at the

hearing. The only issue in dispute at the hearing was whether or not the insurer was responsible for payment of the left total hip replacement surgery.[1] (Dec. 642.)

The employee filed a motion to allow additional medical testimony based on the complexity of the medical issues, citing for support his pre-existing arthritis in his hip as well as the disagreement between the several doctors consulted on the case.[2] (Dec. 644.) The judge ruled the medical issues were not complex and denied the employee's motion. In his decision, the judge denied and dismissed the employee's claim for payment of the left total hip replacement surgery. (Dec. 646.)

The employee appealed, asserting that the judge abused his discretion in denying the employee's motion to find the medical issues complex. Although we affirm the decision and find there was no abuse of discretion, the judge's comments regarding the standard for finding medical complexity require discussion.

The judge stated, "[t]he employee argues that the medical issues of this case are complex; that his pre-existing arthritis in the hip, and the disagreement between the several doctors consulted on this case, makes this case medical [sic] complex. I disagree." (Dec. 644.) Had the judge left his ruling alone as quoted above, additional comment would be obviated, since "[n]either the statute nor the regulations explicitly require judges to set forth the grounds for a ruling on any motion including that involving a motion for additional medical evidence, which comports with general civil practice on motions." Dunham v. Western Massachusetts Hospital, 10 Mass. Workers' Comp. Rep.

[1] The employee's attorney raised the issue of causal relationship of the left and right knee injuries in this appeal; however, a review of the decision and transcript clearly reveals that the sole issue in dispute at the hearing was the causal relationship of the left hip injury and total hip replacement surgery. (Dec. 642, Tr. 3.) Therefore, the issue of causation with respect to the knee is waived. See Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001) (issues and arguments not raised below are waived on appeal).

[2] The judge did admit additional medical reports covering the knee injuries as exhibits numbered 4, 5, 6 and 7; however, they were admitted for the limited purpose of providing a medical history.

818, 822 (1996), citing Mass. R. Civ. P. 3 and 7.[3] However, the judge then expanded on his medical complexity analysis, which prompts our further comment.

The judge asserted a general standard for medical complexity analysis that we have rejected. The judge wrote:

> Medical complexity comes in two forms---a combination of two dissimilar medical specialties, such as orthopedics and psychiatry; or a case involving an unsettled area of medicine where the medical community has not yet reached a consensus.
>
> . . . .
>
> While a complexity analysis is restricted just to the two instances referred to above, inadequacy arguments can cover a wide range of factors.

(Dec. 645.)

This analysis runs afoul of our well-established rule that a subjective approach to medical complexity is required. In Dunham, supra, we held:

> The explicit language of §11A(2) accords administrative judges discretion to determine whether a medical issue is complex and even authorizes judges in appropriate cases to allow additional medical evidence *sua sponte*. . . . Complexity, however, is defined in neither the statute nor in the regulations. . . . As with any qualitative concept, complexity involves a subjective component. Like beauty, it is in the eye of the beholder, because one person's complexity is another's simplicity. What one views as complex is largely dependent on individual knowledge, experience and education.

Id. at 821-822

Moreover, we have specifically rejected an objective approach to determining medical complexity:

> The employee urges us to articulate 'a bright line objective standard for [sic] determine when a case is medically complex.' (Employee supp. br. 2.) We decline the invitation, and note the Appeals Court has affirmed, on multiple occasions, our position that a judge's decision whether or not to consider

[3] "Although board proceedings are not governed by the Rules of Civil Procedure, they may 'provide instruction by analogy.' " Merlini v. Consulate General of Canada, 26 Mass. Workers' Comp. Rep. 195, 205 n. 15 (2012), quoting Rodriguez v. Carilorz Corp., 23 Mass. Workers' Comp. Rep. 89, 94 n. 11 (2009).

> additional medical evidence is to be reviewed under the 'abuse of discretion' standard.

Murphy v. American Steel & Aluminum Corp., 25 Mass. Workers' Comp. Rep. 71, 76 (2011), and cases cited, aff'd Murphy's Case, 81 Mass. App. Ct. 1117 (2012) (Memorandum and Order Pursuant to Rule 1:28).

However, the judge's misstatement of the medical complexity standard in the instant case does not require recommittal,[4] since the remainder of his comments on medical complexity nonetheless reveal a well-reasoned and rational analysis evidencing no abuse of discretion. The judge stated:

> This case involves an orthopedic injury and an orthopedic condition (arthritis) that has been treated by orthopedic doctors and assessed for this action by an orthopedic independent medical examiner. Dr. Abate, an orthopedic doctor, is qualified to comment on all medical aspects of this case and has done so in a convincing manner. The disagreement between doctors argument is not an example of complexity. If that argument was accepted then every case would be complex as medical claims are not permitted to go forward unless there is a disagreement between doctors.

(Dec. 645.)

The judge's denial of the employee's motion for additional medical evidence based on his finding of no medical complexity was within his authority and not an abuse of discretion. Murphy, supra, at 77.

Accordingly, we affirm the decision.

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Martin J. Long
Administrative Law Judge

_____
William C. Harpin
Administrative Law Judge

[4] The employee's brief does not request any specific remedial action; however, recommittal to the same administrative judge would be the appropriate remedy, if any were necessary, in this instance.

Carol Calliotte
Administrative Law Judge

Filed: May 10, 2017