COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 038472-17**

Roger Franco	Employee
O'Connor Corporation	Employer
Massachusetts Employers Ins. Co.	Insurer

REVIEWING BOARD DECISION
(Judges Long, Fabiszewski and O'Leary)

The case was heard by Administrative Judge Preston.

APPEARANCES
Judith B. Gray, Esq., for the employee
Steven M. Taylor, Esq., for the insurer

LONG, J. The insurer appeals from the administrative judge's decision awarding a closed period of § 35, temporary partial incapacity benefits, ongoing § 34 temporary total incapacity benefits, and §§ 13 and 30 medical benefits for the employee's left and right knee injuries. Finding merit in the insurer's arguments regarding lack of testimonial or evidentiary support for the judge's findings, we vacate the decision and recommit the matter for further and specific findings of fact and rulings of law regarding the employee's alleged left and right knee injuries.

The employee, Roger Franco, is a long-term union boilermaker who worked for O'Connor Corporation and sustained a left knee injury on October 27, 2017, while moving a mitigation fan. (Dec. 5.) The employee's claim for §§ 34, 35 13 and 30 benefits was conferenced under § 10A on September 25, 2019, and an order of benefits was filed. The insurer's appeal was timely filed, the employee was examined by §11A impartial examiner, David Morley, M.D., on January 9, 2020, and a hearing was held on November 30, 2022. The employee was the only witness to testify at the hearing. The judge allowed a joint motion to admit additional medical evidence and both parties submitted medical expert materials. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of board file.) The

employee claimed § 34 benefits from June 22, 2018, to August 19, 2018, and March 9, 2021, to date and continuing. Also claimed were § 35 benefits from August 20, 2018, to March 8, 2021, and medical benefits pursuant to § 13 and 30. The insurer denied original liability, disability, causal relationship and denied entitlement to § 51, reserved for successive insurer.[1] (Dec. 3.)

On September 21, 2023, the judge issued the hearing decision currently under appeal. In his decision, the administrative judge found as a result of the employee's "long term multiple left knee problems that he suffered at work…and the resulting surgeries and treatment, he is…permanently incapable of the physical demands of his prior occupation," determining that "the employee is not able to perform any work." (Dec. 5.) The administrative judge relied on the employee's credible testimony, "together with the opinions of his physicians" in finding the employee was temporarily totally and partially incapacitated for the periods as claimed. (Dec. 7.) With respect to causal relationship, the administrative judge ruled that "[t]he evidence is clear and recorded and uncontroverted that the industrial accidents the [e]mployee sustained have caused the [e]mployee to withstand the necessary surgeries…" and rejected the insurer's defense regarding the employee's right knee condition, concluding that the employee's "medical treatment and right knee surgery is a causally related sequala [sic.] of his left knee work injuries and surgeries." (Dec. 8.) The insurer was found responsible for the employee's left and right knee injuries and ordered to pay the § 34 and § 35[2] benefits as claimed, as well as §§ 13 and 30 medical benefits for the left and right knee injuries. (Dec. 8-9.)

The insurer argues the judge erred by "failing to reference specific testimony and/or medical evidence when finding a causal relationship for the employee's alleged right knee complaints to his October 20, 2017 work accident." (Ins. br. 11.) In addition,

[1] The employee did not claim § 51 benefits nor was another insurer involved in this claim.

[2] The § 35 benefits were to be "based on the employee's actual wages earned from August 20, 2018 to March 8, 2021, based on the average weekly wage of $1,680.00."

they argue that "[t]he administrative judge abused his discretion and acted arbitrarily and capriciously by failing to reference the factual and/or medical evidence when finding multiple periods of disability." (Ins. br. 14.) We agree with each of the insurer's arguments and recommit the case to the administrative judge to make findings of fact and rulings of law with specificity and support from the evidence admitted.[3]

As the insurer notes, "[t]he judge's general findings on disability are conclusory and fail to recite specific evidence with factual determinations." (Ins. br. 14.) While the administrative judge leaves little doubt that he believed the employee's testimony and found his physicians' opinions persuasive, we are left to surmise and conjecture as to what testimony was involved and even which specific medical opinions were adopted. The conclusory findings are simply unsupported by any identifiable subsidiary findings with nary a reference as to what evidence, lay or expert, was used to make the ultimate factual determinations in the case. See Fragale v. MCF Industries, 9 Mass. Workers' Comp. Rep. 168, 172 (1995).

To the extent the judge found the employee's closing argument to be "material and informative as background in the history of his left knee issues prior and subsequent to the left knee workplace accident of October 20, 2017," we re-iterate that closing arguments are not evidence. See Haley's Case, 356 Mass. 678, 681-682 (1970)(nothing can be considered evidence which is not introduced as such). In any event, even if the closing argument could have been considered as evidence, the judge again did not indicate what portions or which experts he found persuasive. In this instance, the reviewing board cannot perform its appellate function because the issues are not addressed with clarity such that we can, with reasonable certainty, determine whether correct principles of law have been applied to facts that could properly be found. Praetz

[3] The insurer also argues that the judge erred by not specifically referencing its vocational expert report in the decision; however, the judge did list the insurer's expert report of Susan Sheehan, M.Ed., CAGS, CRC, as "Exhibit 7." While the better practice would have been to denote the expert's name and qualifications, we are satisfied that the judge considered the evidence by identifying the report in this fashion.

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v. Factory Mut. Eng'g Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993). We therefore vacate the hearing decision and remand to the judge for further general and subsidiary findings of fact and rulings of law supported by specific references to the evidence submitted at hearing.

In the meantime, the conference order is restored. See Lafleur v. M.C.I. Shirley, 28 Mass. Workers' Comp. Rep. 179, 192 (2014).

So ordered.

Martin J. Long
Administrative Law Judge

Karen S. Fabiszewski
Administrative Law Judge

Kevin B. O'Leary
Administrative Law Judge

Filed: **April 26, 2024**