COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NO. 037199-14**
Tammy Doherty	Employee
Union Hospital	Employer
Partners Healthcare System, Inc.	Self-insurer

REVIEWING BOARD DECISION

(Judges Calliotte, Koziol and Long)

This case was heard by Judge Herlihy.

APPEARANCES

Michael C. Akashian, Esq., for the employee
Christina Schenk-Hargrove, Esq., for the self-insurer

CALLIOTTE, J. The self-insurer appeals from a decision ordering it to pay the employee § 34 temporary total incapacity benefits from January 13, 2016, to date and continuing. The self-insurer makes several arguments, centering on its contention that the statute of limitations not only bars the employee's claim, but also forecloses the judge's ability to find the employee's initial injury was compensable for purposes of determining the applicability of § 1(7A). We affirm the decision.

The employee was a forty-one-year-old registered nurse at the time of the hearing. She first injured her neck at work in January 2007, and sought treatment at the emergency room at that time. She continued to work, with worsening pain, until March 27, 2007, when she had a C5-C6 anterior cervical discectomy and fusion. She was out of work for four months before returning to work full duty with the employer. (Dec. 4.) She did not file a workers' compensation claim for this injury, (Dec. 6), but testified she collected short-term disability benefits for the period she was out of work. (Tr. 38.) She further testified she did not report to her employer that she had suffered a work-related injury in 2007. (Tr. 35.)

In 2009, the employee once again sought medical treatment for neck pain, but continued to work. On March 10, 2012, after working a twelve-hour shift which she

considered "a heavy assignment," she became unable to turn her neck. She had physical therapy and corticosteroid injections, (Dec. 4, 5), and was out of work for about three months, during which time she again collected short-term disability benefits. (Dec. 5; Employee Ex. 6; Tr. 17.) She then returned to full duty until April 15, 2014, when she left work due to increased neck pain. On July 22, 2015, she underwent a C6-C7 anterior cervical discectomy and fusion. (Dec. 4.) She has not returned to work.

The employee filed a claim for compensation on or about October 19, 2015, listing her last day of work, April 15, 2014, as the date of injury. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2016)(reviewing board may take judicial notice of board file). The "Employee's Claim," Form 110, indicated she suffered a cumulative injury "after years of lifting and moving patients." See Trombetta's Case, 1 Mass. App. Ct. 102, 105 (1973)(in absence of other evidence establishing a more clear-cut date, last day of work may be considered date of injury in repetitive injury cases). The "Insurer's Notification of Denial," Form 104, listed, as grounds for denial, no personal injury, no injury arising out of and in the course of employment, no disability, no causal relationship, § 1(7A), and late claim, beside which was typed, "Self-insurer prejudiced by late notice." Rizzo, supra. Following a § 10A conference on January 14, 2016, the judge ordered the self-insurer to pay § 34 benefits from the conference date forward.[1] Only the self-insurer appealed. (Dec. 2-3.)

At hearing, the employee claimed § 34 benefits from April 16, 2014, to date and continuing. The self-insurer raised liability, disability and extent thereof, causal relationship, and § 1(7A). (Dec. 3.) Pursuant to § 11A, Dr. John J. Lynch, an orthopedic surgeon, examined the employee on March 29, 2016, and was deposed on January 24, 2017. Id. The judge allowed the parties to submit additional medical evidence, based on the complexity of the medical issues. In his report, Dr. Lynch diagnosed the employee with the following: 1) cervical disc herniation C5-6 causally related to the January 2007

[1] We note that the self-insurer did not raise late claim or late notice in the conference memorandum. Rizzo, supra.

work injury, status post cervical disc excision and fusion on March 29, 2007; 2) cervical disc disease C6-7 with radiculitis to the right arm, status post cervical disc excision and fusion on July 22, 2015, related to work activities of March 10, 2012; 3) chronic myofascial pain syndrome status post cervical disc surgery. (Dec. 5; Ex. 4, report of Dr. Lynch.) In his deposition, he opined that all three diagnoses were causally related to the employee's work activities in 2007 and 2012. (Dec. 5; Dep. 25.) He further opined that the employee's 2012 and 2014 work activities combined with the 2007 work activities to remain a major cause of the employee's disability and need for treatment. (Dec. 5; Dep. 30.)

The judge "credited the employee's testimony"[2] and found that she "injured her neck while in the course of performing her duties as a registered nurse with the employer, *up to her last day of work on April 15, 2014*." (Dec. 6; emphasis added.) Addressing §1(7A), the judge wrote:

> It is the insurer's contention that medical records dating back to 2007 dealing with surgeries to the cervical spine prior to the claimed date of injury [ ] and through April 15, 2014 trigger[] the defense of § 1(7A). I disagree. The employee did not file a claim for the 2007 surgery to her neck at work, she returned to work and continued working until April 14, 2014. I find the employee injured her neck in 2007 while performing her duties as a registered nurse with the employer. *The employee's neck injuries relating to the 2007 incident would be compensable.* The work related neck surgery does not trigger the application of § 1(7A). Indeed, I have adopted the opinion of Dr. Lynch and find the employee's work activities remain a major but not necessarily predominant cause of the employee's disability and need for treatment.[3]

(Dec. 6-7; citation omitted; emphasis added.)

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[2] The employee testified that, in March or April 2014, "I was working and the pain just got so excruciating I was unable to move." (Tr. 17-18). Further, on Dr. Saechim Kim's advice, she attempted conservative treatment until April 15, 2014, "when I just could not work another day." (Tr. 18.)

[3] In light of her finding that the 2007 injury was compensable and § 1(7A) did not apply, the judge was not legally required to address whether the employee's work activities remain a major cause of her disability and need for treatment. Accordingly, because we affirm the judge's finding regarding the compensability of the 2007 injury, we do not address the judge's "a major cause" finding.

Adopting Dr. Lynch's restrictions, and crediting the employee's testimony regarding her limitations, (Dec. 5, 6), the judge found the employee unable to perform non-trifling work activity, and thus totally disabled. (Dec. 6.) She ordered the self-insurer to pay § 34 benefits from January 13, 2016, to date and continuing.[4] (Dec. 8.)

The self-insurer appeals, arguing, first, that the employee's claim is barred by the four-year statute of limitations, G. L. c. 152, § 41.[5] The self-insurer alleges the claim is time-barred because it was not filed until 2015, despite the fact that the employee alleges she was initially injured at work in 2007, and "always thought" her condition was work-related. (Tr. 35.) The self-insurer does not argue that it properly raised § 41's late claim provision, but seems to contend that the statute of limitations is jurisidictional, making it the employee's burden to prove she has satisfied its requirements regardless of whether it is raised.

Section 41, like § 1(7A), is in the nature of an affirmative defense, see MacDonald's Case, 73 Mass. App. Ct. 657, 659-660 (2008), which must be raised before the burden shifts to the employee to prove she has complied with the notice and claim requirements it prescribes.[6] The Supreme Judicial Court has specifically held that, where

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[4] Although the employee had claimed benefits from April 15, 2014, she failed to appeal the conference order awarding benefits beginning January 13, 2016. Thus, she could not do better at hearing than at conference. Staff v. Lexington Builders, Inc., 31 Mass. Workers' Comp. Rep ___ (June 27, 2017). At any rate, the employee has not appealed the hearing decision.

[5] General Laws, c. 152, § 41, provides, in relevant part:

> No proceedings for compensation payable under this chapter shall be maintained unless a notice thereof shall have been given to the insurer or insured as soon as practicable after the happening thereof, and unless any claim for compensation due with respect to such injury is filed within four years from the date the employee first became aware of the causal relationship between his disability and his employment.

[6] Notice of injury and claim for compensation are two distinct requirements within § 41, Nason, Koziol & Wall, Workers' Compensation, § 15.2 (3rd ed. 2003), although they are often discussed simultaneously. While the self-insurer points out the employee failed to report the 2007 and 2012 injuries in a timely manner, it does not argue that the employee's claim is barred because she did not give proper notice. Therefore, we do not address this requirement, except to note that, like late claim, it was not raised at hearing, and would thus be waived, in any event.

no contention was made at hearing or before the reviewing board concerning late filing of the claim, the question cannot be raised for the first time on appeal. Rich's Case, 301 Mass. 545, 547 (1938). The reviewing board has also noted that, "Section 41 does not operate to bar compensation unless the self-insurer raises it as an issue." Dugas v. Bristol County Sheriff's Dep't, 17 Mass. Workers' Comp. Rep. 349, 353 n. 3 (2003). See Nason, Koziol & Wall, Workers' Compensation, § 15.2 (3rd ed. 2003)(question of notice and claim does not become an issue in a case unless raised by the insurer; it may be waived by not being raised below or pressed on appeal).

The self-insurer cites no cases that support its position that the statute of limitations is essentially self-operational, and we have found none. Rather, even the case law it cites assumes the insurer must *raise* the statute of limitations in order for it to come into play. As the court in Fenton's Case, 81 Mass. App. Ct. 1142 (2012)(Memorandum of Decision Pursuant to Rule 1:28)(emphasis added), affirming Fenton v. King Philip Regional School Dist., 25 Mass. Workers' Comp. Rep. 189 (2011), explained, "*Once the insurer raised the statute of limitations* as a basis for dismissal, and established that the claimant's claim was brought nearly eleven years after the injury, 'the burden of proving facts that take the case outside the statute of limitations [fell] to the [claimant],' " quoting Silvestris v. Tanasqua Regional Sch. Dist., 446 Mass. 756, 766-767 (2006)(referring to statute of limitations as affirmative defense). See Smith v. City of Boston, 10 Mass. Workers' Comp. Rep. 129, 131 (1996)(emphasis added)("It is the employee's burden to demonstrate that the statutory requirements [of § 41] are met *once the issue is raised*). See also Sullivan v. St. Joseph's Parish, 21 Mass. Workers' Comp. Rep. 263, 265 (2007)(referring to "[t]he self-insurer's *properly raised* statute of limitations defense"), aff'd Sullivan's Case, 76 Mass App. Ct. 26 (2009).

Further, the regulations applicable to practice before the board[7] provide that, unless the self-insurer raises the statute of limitations *at hearing*, that issue is waived.[8] 452 Code Mass. Regs. § 1.11(3), provides, in relevant part:

> *Before the taking of testimony in a hearing before an administrative judge, the insurer shall state clearly the grounds on which the insurer either has declined to pay compensation,* or the grounds on which it seeks modification or discontinuance, provided that such statements are based on grounds and factual basis reported by the insurer or based on newly discovered evidence within the provisions of M.G.L. c. 152, §§ 7 and 8, and 452 CMR 1.00. *On all other issues the employee's rights under M.G.L. c. 152 shall be deemed to have been established.*

In Bamihas v. Table Talk Pies, 9 Mass. Workers' Comp. Rep. 595, 597 (1995), we held,:

> The import of regulation 1.11(3) is unmistakable: an insurer must give the employee fair notice of the grounds for its defense at hearing. See Haley's Case, 356 Mass. 678, 681 (1970)(parties are entitled to opportunity to present evidence and "to know what evidence is presented against them and to an opportunity to rebut such evidence, and to argue . . . on the issues of fact and law involved in the hearing").

Thus, although the self-insurer listed "Late Claim" on its initial "Notification of Denial," this action fails to satisfy the regulation or its purpose. The initial denial, while necessary under § 7 for the self-insurer to maintain the defense at hearing, is not sufficient under 452 Code Mass. Regs. § 1.11(3), to enable the self-insurer to maintain the § 41 defense at hearing, unless it is clearly raised at that time. See Phillips's Case, 41 Mass. App. Ct. 612, 618 and n. 10 (1996)("452 Code Mass. Regs. § 1.11(3),

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[7] See Beatty v. Harvard Univ., 26 Mass. Workers' Comp. Rep. 181, 186-187 (2012)(properly promulgated regulations which have a rational relationship to the goal or policies of the agency's enabling statute are accorded deference); see also Bamihas v. Table Talk Pies, 9 Mass. Workers' Comp. Rep. 595, 597 (1995) (regulations have same force and effect as statutes).

[8] It is clear the self-insurer failed to raise the defense of statute of limitations at hearing. On the "Insurer's Hearing Memorandum," it did not check off the boxes for "Proper notice" or "Proper claim" or write in those defenses. (Ex. 3.) After the judge read the issues and defenses and asked if they were properly stated, the self-insurer's counsel replied that they were. When the judge asked if the self-insurer would like to add anything to the list of issues or defenses, counsel declined. (Tr. 9.)

promulgated pursuant to § 7, requires an insurer to state its grounds for defense at the hearing; reviewing board did not err in refusing to consider insurer's § 41 defense, where it was not raised at hearing). The regulation further recognizes "the clear legislative intent to establish a system which narrows the issues as litigants proceed through the dispute resolution process." Vallieres v. Charles Smith Steel, Inc., 23 Mass. Workers' Comp. Rep. 415, 417 (2009; see Murphy v. Commissioner of Dep't of Indus. Accidents, 415 Mass. 218, 223-225 (1993)(setting out the four steps of the dispute resolution process). As cases work their way through dispute resolution, defenses may be abandoned or resolved, thus requiring a clear statement of issues at the hearing, which is a de novo proceeding. Vallieres, supra at 417.

Moreover, the self-insurer's initial presentation of its statute of limitations argument in its hearing brief, filed on the day the record closed, does not satisfy the regulation's requirement that the statute of limitations defense be raised at hearing, as it did not provide the employee with "fair notice of the grounds for its defense at hearing," Bamihas, supra, or an opportunity to present any evidence in opposition to this defense. In essence, the argument was too little too late. See Santos v. George Knight & Co. 14 Mass. Workers' Comp. Rep. 289, 293-294 (2000)(filing of brief after close of evidence does not cure problem caused by failure to object to or move to strike impartial examiner's testimony). Accordingly, consistent with the axiom that, " 'Objections, issues, or claims--however meritorious-- that have not been raised' below, are waived on appeal," Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001), quoting Wynn &. Wynn, P.C. v. Massachusetts Commn. Against Discrimination, 431 Mass. 655, 674 (2000), we hold the insurer waived the statute of limitations defense by failing to raise it at hearing. See also Nason, Koziol & Wall, supra at § 15.2 (§ 41 late claim and notice issues may be waived if not raised below).

The self-insurer next challenges the judge's finding that the 2007 injury was work-related, thus defeating the application of § 1(7A).[9] See Martinez v. George's

[9] G. L. c. 152, § 1(7A), provides, in relevant part, as follows:

Renovations, LLC, 28 Mass. Workers' Comp. Rep. 73, 76 (2014)(where prior condition is the result of work injury, § 1(7A)'s a major cause standard does not apply). The self-insurer argues that injuries outside the four-year statute of limitations cannot properly be found to be work-related, i.e., "compensable," for § 1(7A) purposes. (Self-insurer br. 5.) We disagree.

In Saab v. Massachusetts CVS Pharmacy, LLC, 452 Mass. 564, 566 (2008), the court construed the words "compensable under this chapter" as they appear in § 24 to mean that, "whether an employee's injury is compensable under the act . . . does not turn on whether a claimant is entitled to or actually receives compensation under the act." In other words, "if an employee suffers a personal injury that arises out of and in the course of her employment, her 'injury is . . . "compensable" irrespective of whether compensation for [her] injury is available under the act.' " Richards v. US Bancorp, 28 Mass. Workers' Comp. Rep. 115, 120 (2014), quoting from Saab, supra at 569-570.[10] Here, the judge's findings clearly support the conclusion the 2007 injury arose out of and in the course of employment, and is thus compensable. See Saab, supra. The judge found, "[T]he employee injured her neck in 2007 while performing her duties as a registered nurse with the employer. The employee's neck injuries relating to the 2007

> If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease *not compensable* under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

(Emphasis added.)

[10] It is a rule of statutory construction that, "[I]f reasonably practicable, words used in one place in a statute with a plain meaning are given the same meaning when found in other parts of the same statute to the end that there may be a harmonious and consistent body of law." In re Gagnon, 228 Mass. 334 (1917); Randall's Case, 331 Mass. 383, 385 (1954); Lantner v. Carson, 374 Mass. 606, 611 (1978). We see no reason to deviate from that rule here. Cf. DiCarlo v. Suffolk Constr. Co., Inc., 473 Mass. 624, 629-630 (court applies rule that when legislature uses the same term in the same section, the term should be given a consistent meaning throughout, rather than rule in Randall's Case, supra, where the latter rule would require the word in question ["injury"] to take on two different meanings within same section [§ 15]).

incident would be compensable. The work-related neck surgery does not trigger the application of § 1(7A)." (Dec. 6-7.) Furthermore, to the extent the judge's finding the employee suffered a 2007, "compensable personal injury was based on her belief of the employee's testimony, it is final and immune from appellate review." Faieta, III, v. Boston Globe Newspaper Co., 18 Mass. Workers' Comp. Rep. 1, 6 (2004), and cases cited. Under these circumstances, it is irrelevant for § 1(7A) purposes that the employee had not received compensation for the 2007 injury, or that it occurred more than four years before the April 15, 2014, claimed date of injury.[11] There was no error in the judge's finding that the employee suffered a prior compensable injury in 2007, which relieved the employee of the burden of proving her cumulative work injury, up to and including her last day of work on April 15, 2014, was a major cause of her disability and need for treatment.

There is no merit to the self-insurer's third argument challenging the judge's findings of a causally related work injury in 2012. The employee's testimony and Dr. Lynch's adopted opinion adequately support those findings. (Dec. 5; Dep. 25.) To the extent the self-insurer alleges the employee failed to notify the employer or self-insurer as soon as practicable of the injury under § 41, it has failed to properly raise that issue below. Moreover, there could be no late claim issue, as the 2012 injury was within four years of the filing of the 2015 claim.

The self-insurer's final argument, that there is no reliable medical evidence proving the employee's work activities caused her pain to increase to the point she had to

[11] See also Fahey's Case, 77 Mass. App. Ct. 1113 (2010) (Memorandum and Order Pursuant to Rule 1:28), holding that, where the employee sustained two prior industrial injuries in 1988 and 1990, § 1(7A)'s heightened causation standard did not apply to the employee's claimed 2003 industrial injury. The record established that the two earlier injuries were reported contemporaneously by the employee and the employee sought treatment. "This proof sufficed to establish that compensable injuries occurred. There is no requirement that an industrial injury result in disability or limitation, or that it manifest itself in incapacity to work for it to be compensable." Id.; see Saab, supra at 570. Although, here the judge did not find the employee contemporaneously reported the 2007 injury, that fact is irrelevant. As was her prerogative, she credited the employee's testimony, and adopted the medical opinion of Dr. Lynch, to find that the employee injured her neck at work in 2007.

stop work on April 15, 2014, is without merit. As was her prerogative, the judge adopted Dr. Lynch's opinion, which supported that finding. (Dec. 5; Dep. 30.)

Accordingly, the decision is affirmed. Pursuant to G. L. c. 152, § 13A(6), the self-insurer is directed to pay employee's counsel a fee in the amount of $1,654.15.

So ordered.

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Carol Calliotte
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: ***November 16, 2017***

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Martin J. Long
Administrative Law Judge