COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024590-16**

Thomas Welenc	Employee
Verizon New England, Inc.	Employer
New Hampshire Insurance Co.	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Fabricant and Long)

This case was heard by Administrative Judge Rosado.

APPEARANCES
Ronald F. Belluso, Esq., for the employee
W. Todd Huston, Esq., for the insurer

KOZIOL, J. The insurer appeals from a hearing decision ordering it to pay the employee § 34 benefits from August 14, 2017, to date and continuing, as well as §§ 13 and 30 medical benefits "for the care and treatment of the Employee's right knee, including surgery and rehab as directed by his physician," as a result of a September 13, 2016, work-related injury.[1] (Dec. 12.) We discuss four of the five issues raised by the insurer on appeal, one of which resulted in the insurer being denied due process of law. Accordingly, we vacate the decision and recommit the matter for a de novo hearing.

We summarize only those facts necessary to examine the issues on appeal. The fifty-eight-year-old employee worked for the employer for twenty-two years as a splice service technician "operating a bucket truck, installing, repairing, and/or splicing telephone wiring/cables for residential and commercial customers building phone

[1] The transcript states that August 14, 2017, was the date from which benefits were awarded in the judge's conference order, and that the insurer was the only party to appeal that determination. In addition, the judge stated, without objection, that prior to that date, the employee was paid "long-term disability, short-term disability and he's not going to get paid twice for the disability period." (Tr. 6-7.)

systems." (Dec. 6.) The judge found that on September 13, 2016, the employee injured his knee at work when he "twisted his right knee descending a ladder at a new construction installation site." (Dec. 10.) The judge also found:

> The employee had a history of right knee problems and in June, 2013 had a right knee arthroscopy with partial meniscectomy. Right knee symptoms persisted and on August 20, 2014 he underwent a total knee replacement followed by revision surgery of the total knee arthroplasty performed on April 6, 2015. Five months post-surgery and rehabilitation, on or about September 2015, the Employee returned to his job for Verizon performing his regular duties. He had no right knee problems working until he sustained a new industrial injury to the right knee September 13, 2016. Through hearing he remained physically restricted with limitations: sitting, standing, walking, experiencing unremitting weakness, pain, numbness and instability of the knee and disrupted sleep because of the pain.

(Dec. 6-7.)[2] She concluded that "there is a causal relationship between the Employee's complete incapacity for work since September 13, 2016 through this hearing," and "that the Section 1(7A) affirmative defense by the Insurer has no standing in light of the opinion of Dr. Morley [the § 11A medical examiner] referenced." (Dec. 11.)

The insurer asserts that the decision must be reversed because the judge committed errors, two of which it claims resulted in the insurer being denied due process of law. First, we agree the judge denied the insurer due process of law by blocking its attempts to impeach the employee's testimony and excluding the admission of the impeachment evidence. This error requires us to vacate the decision and recommit the matter for a hearing de novo. We do not agree with the insurer's assertion that it was also denied due process of law by the judge's denial of its motions to compel discovery. We agree however that the judge erred by: 1) failing to make any findings relating to her denial of the insurer's Motions to Strike the records of the employee's physician, Dr. Michael Ackland, due to his alleged constructive unavailability for deposition; and, 2) failing to conduct the analysis required by Vieira v. D'Agostino Assocs., 19 Mass. Workers'

[2] The employee never filed any workers' compensation claims regarding his three prior knee surgeries. (Tr. 36-39.) His present claim for the September 13, 2016, injury was the first time he filed a workers' compensation claim regarding his right knee. (Tr. 36.)

Comp. Rep. 50 (2005). We do not address the insurer's remaining argument regarding the judge's reliance on the opinions of Dr. Morley, as the matter must be reheard de novo.

The insurer first asserts the judge erred by excluding admission of the employee's civil complaint, filed in U.S. District Court, alleging malpractice/product liability for implantation of a defective right knee prothesis, and by prohibiting the insurer from cross-examining the employee about the allegations in that complaint. (Ins. br. 7-9.) Second, it argues the judge improperly denied its Motion to Compel Production of Documents, filed three separate times, seeking production of documents associated with the employee's civil suit. The insurer argues that, by denying the motion, the judge prevented it from investigating an issue in controversy, "irreparably harm[ing]" its defense of the case. (Ins. br. 12-14.) As a threshold matter, we note that the insurer properly preserved these issues for our review by making appropriate offers of proof and by attaching the excluded evidence as an exhibit to its motions. Cf. Griffin v. M.B.T.A., 34 Mass Workers' Comp. Rep. ____ (5/04/20)(excluded evidence not offered as an exhibit for identification, or produced as part of an offer of proof, results in failure to preserve issue for proper appellate review).

"In accordance with general equity practice, a decree in a workers' compensation case will not be reversed for error in the . . . exclusion of evidence, unless substantial justice requires reversal." Indrisano's Case, 307 Mass. 520, 523 (1940)(and cases cited); Moss's Case, 451 Mass. 704, 714 (2008). The record confirms the judge blocked the insurer's attempt to impeach the witness's credibility, even though no objection was raised by the employee. The exchange between insurer's counsel and the judge shows that, even after counsel made an offer of proof, the judge failed to appreciate the purpose for which the evidence was being offered.

By Mr. Huston:

> Q: Okay, I'd like to understand what your condition was following your third knee surgery [April 6, 2015]. Following the knee surgery, did you have any right knee symptoms?
> A: After my revision, no.

Q: Okay. You had no pain in your knee?
A: No. Not when I went back to work.
Q: Okay. Did you have any issue with your right knee following the second knee revision?
A: No.
Q: Were you able to engage in your normal activities following this third surgery?
A: Yes.
Q: Did you experience any ongoing adverse effects in your right knee following this third surgery?
A: No.
Q: So if we took a snapshot on the day before 9/12/16; you were pain free?
A: I don't recall having nowhere near as much pain as I have now but, no, I didn't have pain.
Q: And after returning to work, after your third knee surgery up until the time of this accident on 9/13/16, did you miss any work due to your right knee?
A: No.
Q: Okay. And you filed a lawsuit relative to your right knee, your second - - strike that.
You filed a lawsuit relative to your first total knee prosthetic; is that correct?
A: Correct.
Q: What is the status of that lawsuit?
A: I'm not allowed to talk about it. I've signed a paper saying I can't talk about it.
Q: Did you settle it?
A: I'm not allowed to talk about it.
Q: But you did file a lawsuit; is that correct?
A: Correct.
Q: Showing you a copy of a lawsuit if you can tell me if you recognize that document?
The Judge: What is the relevance of this?
Mr. Huston: I think it's relevant on a number of different issues. First of all, if he's now claiming it's work-related injuries prior to this then I think the insurer would be entitled to - -
The Judge: --he's not making that claim right now[3] that's not what we are here on. We are here on the 9/13/16. He's testified what the symptoms were before the injury we have the medical records so.

[3] Contrary to the judge's statement, the employee testified regarding his prior surgeries, "They were all work related," and "I have told all my doctors that it was all work related." (Tr. 39, 40.)

Mr. Huston: So the fact of the matter is, your Honor, this was filed in April of 2017.
At the time that he filed this complaint, contrary to what he just testified to, he pled in the complaint that he was continuing to suffer great pain of body and anguish and he was continuing to experience issues with his second knee revision and that he was unable to engage to normal activities, usual normal usual activities.
Now he's testified just now that none of that occurred. This is filed after the accident.
Mr. Belluso: I object, your Honor.
The Judge: This has to do with the 2014. The surgery that's unrelated to the 2016 date of injury.
Mr. Huston: This complaint has to do with what his complaints were, physical complaints as of the date of the filing of this, which is April of 2017.
The Judge: Related to what?
Mr. Huston: Relating to his medical malpractice claim against the manufacturer of the prosthetic.
And now he's just testified - - he states in the complaint that he has ongoing problems. He testified that he had no ongoing problems, that goes to the credibility of the witness.
The Judge: The claim for the defective condition is not related to the workers' compensation claim.
So address the issues with respect to the workers' compensation claim.
Mr. Huston: I am addressing the issues, your Honor, because this is 4/17, April of 2017.
So he filed this complaint with current complaints saying they're related not to his industrial accident but to the 2014 revision, I'm sorry, the prosthetic, so how is that not going to his credibility that he's now testified the opposite of what he's pled.
The Judge: You can ask him about what his complaints are today with respect to his workers' compensation injury.
Mr. Huston: But I cannot inquire about this complaint?
The Judge: That is not the issue before me. The issue is his workers' compensation claim.
Mr. Huston: Credibility is always at issue.
The Judge: It is at issue and you already addressed the issue.
Mr. Huston: And you are preventing me from effectively cross-examining the statements that he made.
The Judge: Statements with respect to a 2014 or 2013 surgery; they're two separate issues.
Mr. Huston: How can we - -

The Judge: Can we go off the record for a minute.
(Off the record.)

(Tr. 41-45.)

Contrary to the judge's statement that counsel "already addressed the issue" of the employee's credibility, statements of counsel and argument by counsel are not evidence. Harlow v. Chin, 405 Mass. 697, 705 (1989). The insurer was merely making an offer of proof to show why the line of questioning, which it was not allowed to pursue, was relevant.

> Even on cross-examination, where an offer of proof is not ordinarily required, there still must be some indication that the excluded testimony would have been helpful. Commonwealth v. Baker, 348 Mass. [60,] 63 [1964]. Where the purpose of the question is not apparent and the prejudice to the cross-examiner is not clear, the record must disclose the cross-examiner's reason for seeking an answer to the excluded question. Breault v. Ford Motor Co. 364 Mass. 352, 357-358 (1973).

Mac-Rich Realty Constr., Inc. v. Planning Board of Southborough, 4 Mass. App. Ct. 79, 85 (1976). See Mass. Guide to Evidence § 103 (2020)(preserving claims of error in exclusion of evidence).

Upon coming back on the record, the insurer again attempted to cross-examine the employee regarding the inconsistency between his testimony at hearing and the allegation in his lawsuit. This time, however, the judge not only blocked the insurer from cross-examining the employee, but also prohibited the insurer's attempt to admit the civil complaint into evidence.

The Judge: Back on the record.
By Mr. Huston:
Q: Is it your testimony that you had no complaint after the third surgery when you went back to work?
Mr. Belluso: I object as asked and answered previously.
Mr. Huston: I'm just trying to clarify it in the easiest way possible.
The Witness: This date is not correct.
The Judge: That's not the question that was just asked of you. He's asking you if you - - he wants you to confirm your testimony that you did not have issues between your return to work and your injury of 9/20/16 [sic].
The Witness: Did not. And this date is not correct.
Mr. Huston: I would move to enter the complaint in evidence.

The Judge: I'm not entering this into evidence. You can ask him a question if you would like to ask him a question, like we just did.

. . . .

By Mr. Huston:

Q: Did you claim after the incident of 9/13/16, that you had ongoing problems unrelated to the incident of 9/13/16?

A: I don't understand the question.

Q: Following the accident of 9/13/16, have you ever claimed for any reason that you had ongoing problems unrelated to your work activity?

A: Still do not understand what you are asking.

The Judge: Move on.

Mr. Huston: I just feel that I'm being prohibited from cross-examination.

The Judge: Mr. Welenc, you filed a claim with respect to the faulty surgery procedure; is that correct?

The Witness: Yes.

The Judge: And that occurred in 2013?

The Witness: No. This case settled. The date is not right.

The Judge: I just asked you, does that case have anything to do with your 2016 date of injury?

The Witness: No. Absolutely not.

The Judge: Okay. Thank you.

By Mr. Huston:

Q: Did you claim in that case that you had ongoing problems?

Mr. Belluso: Objection, your Honor.

The Judge: I have already asked the question. The employee has testified that that claim has settled. The complaint with respect to that claim, the complaint on that lawsuit had to do with that particular surgery; is that correct?

The Witness: Correct.

The Judge: All right. Move on, please. Thank you.

(Tr. 45-49.)

"Workers' compensation proceedings are governed by the rules of evidence applicable in the courts of this Commonwealth." Canavan's Case, 432 Mass. 304, 309 (2000). The condition of the employee's right knee and the employee's symptoms regarding his right knee, both prior to and following his industrial accident were primary issues in dispute in this case. Indeed, the insurer mounted a § 1(7A) defense based on the

employee's pre-existing knee condition. Moreover, the employee's credibility as a witness was also a primary issue in dispute.

> Impeachment with prior inconsistent statements is one method of testing the witness's credibility. Indeed, it is well established "that if a witness either upon his direct or cross-examination testifies to a fact which is relevant to the issue on trial the adverse party, for the purpose of impeaching his testimony, may show that the witness has made previous inconsistent or conflicting statements." Commonwealth v. Parent, 465 Mass. at 399-400, quoting from Robinson v. Old Colony St. Ry., 189 Mass. 594, 596, 76 N.E. 190 (1905). See Commonwealth v. Polk, 462 Mass. at 33, quoting from Commonwealth v. Ruffen, 399 Mass. 811, 816, 507 N.E.2d 684 (1987). . . . Moreover, where prior inconsistent statements relate to a main issue at trial, the judge has "no discretion to preclude their use for impeachment purposes." Commonwealth v. Donnelly, 33 Mass. App. Ct. 189, 197, 597 N.E.2d 1060 (1992). See Commonwealth v. Moore, 50 Mass. App. Ct. 730, 736-737, 741 N.E.2d 86 (2001) (judge erred in disallowing introduction of contradictory statements which could have undermined witness's credibility). See also Commonwealth v. West, 312 Mass. 438, 440, 45 N.E.2d 260 (1942).

Commonwealth v. Wray, 88 Mass. App. Ct. 403, 408 (2015). "It is axiomatic that a document need not be admissible in order to use it for impeachment. 'A witness may be impeached on cross-examination by reference to prior inconsistent statements which are not admissible substantively.' " Lyman v. Northampton Nursing Home, 23 Mass. Workers' Comp. Rep. 253, 255 (2009), quoting from Commonwealth v. Domaingue, 397 Mass. 693, 702 (1986).

Here, the exchange between the insurer and the judge shows that after being blocked from pursuing the line of questioning, the insurer offered the complaint in evidence on the issue of impeachment, i.e., as evidence affecting the employee's credibility. "Although there is discretion involved in determining whether to admit or exclude evidence offered for impeachment, when the impeaching evidence is directly related to testimony on a central issue in the case, there is no discretion to exclude it." Mass. Guide to Evidence, §613(a)(2), note for subsections (a)(2) & (3) (2020). Thus, the judge erred when she excluded the complaint from evidence. Peck v. New England Tel. & Tel. Co., 225 Mass. 464, 466 (1917). In Peck, the plaintiff alleged personal injuries sustained as a result of using "a telephone instrument" owned by the defendant. During

the plaintiff's direct examination, he testified about the earnings he received from his employer, Gerstein Brothers, through the date of the accident. Id. at 465. Previously, however, the plaintiff brought an action to recover earnings from Gerstein Brothers, wherein he claimed earnings "much less than he testified on direct examination" in the tort action. Id. As the court explained, the record from the plaintiff's action against his employer was admitted properly:

> The rule that pleadings are not evidence do [sic] not apply to this case. While the declaration in the case against Gerstein Brothers was drawn by the plaintiff's attorney, still it may be presumed to have been prepared under the instructions of the plaintiff. . . . [T]he relevancy of the record was to show by declaration that [the plaintiff's] earnings before the injury were much less than he had testified on direct examination that they amounted to. The evidence was shown by the record to affect his credibility. In other words, it was properly allowed to test his honesty as well as the accuracy of his recollection. If the [fact finder] [was] satisfied that he testified falsely as to a material issue in the case, they had a right to consider it in determining the weight and degree of credibility to be given to all his testimony, including not only that which related to damages, but that which referred to any other issue involved in the trial.

Id. at 466.

The employee's counterargument on this issue wrongly asserts that the insurer's brief "contends that being prevented from submitting evidence of a separate lawsuit (malpractice dispute), to be entered into evidence, they were barred from 'securing medical opinions relative to this independent action.' " (Employee br. 7.) The insurer made no such argument on appeal. (Ins. br. 7-9.) To the extent the employee is somehow suggesting that the judge's error was harmless because she opened the medical evidence and allowed the insurer to submit "all prior surgical and treatment notes," it ignores the fact that the matter of witness credibility is an issue solely within the province of the administrative judge. "It is improper for the doctor to assess and comment on the credibility of the employee, as it is the judge's role to make this assessment." Aguinaga v. Sage Engineering and Contracting, Inc., 32 Mass. Workers' Comp. Rep. 29, 31-32 (2018).

By prohibiting the insurer's attempt to impeach the employee's credibility through questioning regarding inconsistencies between his present testimony and allegations he made in another lawsuit, and by then excluding the proffered documents from evidence on the apparent ground that she did not believe the document to be relevant, the judge committed errors that, standing alone, require reversal. Sloane v. Tab Products, 4 Mass. Workers' Comp. Rep. 50, 52-53 (1990)(limiting cross-examination on a central issue in case requires reversal of decision). See also Melendez v. City of Lawrence, 16 Mass. Workers' Comp. Rep. 370, 374 (2002)(failure to consider all evidence in evaluating employee's credibility renders decision arbitrary and capricious). A complete rehearing of the case is required.[4]

This brings us to the insurer's related assertion that the judge erred by "blocking critical discovery," (Ins. br. 13), resulting in a violation of the insurer's due process rights. We disagree. We begin by discussing the timing and contents of the insurer's discovery motion and its subsequent motions to compel.

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[4] The insurer also argues on appeal, that the complaint from the tort case was admissible as an admission by the employee. (Ins. br. 8.) It is not apparent from the record that the insurer sought to admit the complaint as such, or brought this assertion to the judge's attention. There is a distinction between impeachment evidence and an admission.

> A nonbinding admission, sometimes referred to as an evidentiary admission, is the "conduct of a party while not on the stand used as evidence against him at trial. The conduct may be in the form of an act, a statement, or a failure to act or make a statement." General Electric Co. v. Board of Assessors of Lynn, 393 Mass. 591, 603 (1984). Evidentiary admissions, unlike judicial admissions, are not binding on a party, and a party may offer evidence that is inconsistent with an evidentiary admission. Id. "Unlike most prior inconsistent statements, an evidentiary admission is admissible for substantive purposes, not merely on the narrow issue of credibility." Id. Thus, the jury or fact finder can find that a fact is true on the basis on [sic] an evidentiary admission."

Mass. Guide to Evidence, § 611, note, Nonbinding Admissions (2020). In support of its argument, the insurer cites General Electric Co., supra. Because the matter must be retried, the insurer is free to raise this argument upon recommittal. We merely observe that the evidentiary admission in General Electric Co., was contained in answers to interrogatories, and the insurer's brief neither addressed nor discussed our decision in Lyman, supra, where we upheld the judge's refusal to admit an unverified complaint in evidence as an admission by the employee. Id. at 254-255.

Almost two months before the hearing, on May 27, 2018, citing "452 CMR 1.12(2), and related Massachusetts regulations,"[5] the insurer served its discovery request on employee's counsel, seeking, production of medical evidence; discovery materials including answers to interrogatories, depositions and admissions made by the employee; and, any settlement documents, all relating to the employee's lawsuit in U.S. District Court stemming from his defective knee prosthesis. (Dec. 2, Ex. A for Identification, Ex. 1) When the insurer received no response from employee's counsel, insurer counsel sent employee's counsel an email on June 14, 2018, again requesting production of the documents. Id. However, the employee never responded to the insurer's request, as required by 452 Code Mass. Regs. 1.12(3).[6] (Dec. 2, Exhibit A for Identification). On

[5] 452 Code Mass. Regs. § 1.12(2) (2017) states:

> On or after the filing of any claim or complaint, any party may serve on any other party, employer or medical provider rendering treatment to the claimant, a request to produce, and permit the party making the request to inspect and copy, any medical notes, treatment reports and employment records to include but not be limited to record of wages earned subsequent to the alleged injury.

452 Code Mass. Regs. § 1.12(3) (2017) states in pertinent part:

> Any request submitted under 452 CMR 1.12 . . . (2) shall set forth the item or category of items to be inspected, and describe each item or category with reasonable particularity. Such request shall be accompanied by a statement providing the relevance of the requested information to the instant case. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts. . . .

While the subject matter prescribed by subsection two, supra, is limited, 452 Code Mass. Regs. § 1.12(4) implies that discovery requests may include broader subject matters:

> On written motion of a party, the administrative judge to whom the case has been assigned may require, by issuance of any order, compliance with any request for discovery, including any request submitted under 452 CMR 1.12. . . (2).

[6] 452 Code Mass. Regs. § 1.12(3) (2017) states in pertinent part:

> The party on whom the request is served shall respond in writing within 20 days after service of the request. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated.

June 29, 2018, the insurer filed its first Motion to Compel Production of Documents, attaching its discovery request as Exhibit 1 and a Joint Statement by the Parties to the lawsuit as Exhibit 2. Id. At that time, the insurer merely claimed:

> In support of the motion, the insurer does state that these records are necessary in order to ascertain if the employee's current condition is a function of his prior injuries. The documents requested by the Insurer contain relevant and material evidence concerning the employee's medical condition, which is the subject matter of the above captioned action and their production is necessary for the Insurer to adequately prepare for a Hearing in the instant case.

Id. The judge denied the insurer's motion on July 6, 2018. Id.

The hearing on the employee's claim took place on July 23, 2018. As discussed supra, at that point in time, the insurer had possession of the employee's complaint from the lawsuit filed in Federal District Court. The lay evidence closed on that date, with only the medical evidence being left open.

The insurer's Second Motion to Compel Production of Documents was filed on August 21, 2018, nearly a full month after the close of the lay portion of the hearing. In its second motion to compel, the insurer attached the employee's complaint from his lawsuit as Exhibit 2, and additionally stated in its motion:

> The documents in question were filed subsequent to the alleged industrial accident. The allegations contained in the employee's complaint, filed subsequent to the industrial accident allege ongoing disability, ongoing pain of body and anguish of mind, lost time from work and ongoing knee issues relating to the employee's Zimmer lawsuit.
>
> As the employee alleges ongoing knee problems in this complaint, and denied said complaints at Hearing, the insurer is entitled to these documents. Due process, and equity require that the employee produce these documents.

(Dec. 2; Exhibit E for Identification, Insurer's Second Motion to Compel Production of Documents). The judge denied this motion on August 24, 2018. The insurer filed its third and final motion to compel the production of documents on October 18, 2018. Regarding the third Motion to Compel, the judge's decision states, "No favorable action

was taken on the following Insurer motions because they were either previously ruled upon and/or lacked any evidentiary substance." (Dec. 5.)

We review the judge's rulings for an abuse of discretion and find none under the circumstances.

> An administrative judge has broad discretion, and indeed an obligation to control the conduct of hearings and related proceedings. Saez v. Raytheon Corp., 7 Mass. Workers' Comp. Rep. 20, 22 (1993). This includes depositions and discovery authorizations, granting of continuances and enforcement of reasonable deadlines, and even the discretion to dismiss a claim for lack of prosecution in appropriate circumstances to facilitate administrative efficiency. Ackroyd's Case, 340 Mass. 214, 218-219 (1960).
>
> However, judicial discretion to conduct and control proceedings is not unbridled and is subject to appellate review. Ackroyd's Case, supra at 219. Notwithstanding the discretion a judge has to set and conduct hearings and related proceedings, fundamental due process requires that all parties have the aforementioned opportunity to develop a case for that adjudicator's consideration. Meunier's Case, 319 Mass. 421 (1946). Furthermore, as due process and the ability to be actually heard is a keystone of our system of laws, the unremitting pressure to efficiently resolve cases must be tempered by judicial conveyance of real and perceived sense of fairly administered justice permeating each proceeding. Botsaris v. Botsaris, 26 Mass. App. Ct. 254, 257-258 n.5 (1988).

Casagrande v. Mass. General Hospital, 15 Mass. Workers' Comp. Rep. 383, 386-387 (2001). "Where discretion is accorded it can only be overcome when it has been abused." Dunphy v. Shaws Supermarkets, 9 Mass. Workers' Comp. Rep. 473, 475 (1995). We have previously stated:

> We do not interfere with a judge's discretion unless, on judicial review, its exercise is characterized by arbitrary determinations, capricious disposition, idiosyncratic choice, or a failure to consider relevant facts so as to constitute an abuse of discretion amounting to an error of law. See Solimene v. Grauel & Co., KG, 399 Mass. 790, 799 (1987); Ackroyd's Case, 340 Mass. 214, 219 (1960) and cases cited; Dewing v. J.B. Driscoll Ins. Agency, 30 Mass. App. Ct. 467, 470-471 (1991); Greenleaf v. Massachusetts Bay Transp. Auth., 22 Mass. App. Ct. 426, 429 (1986); Saez v. Raytheon Corp., 7 Mass. Workers' Comp. Rep. 20, 22 (1993); Eddins v. F&T Corp., 7 Mass. Workers' Comp. Rep. 143, 144 (1993).

Stacey v. North Shore Children's Hospital, 8 Mass. Workers' Comp. Rep. 365, 368 (1994). We have also observed that, "The smooth operation of this agency is unimaginable without effective procedural constraints." Id. at 369.

The insurer's first Motion to Compel Production of Documents, though timely filed in the sense that it was sought prior to the hearing, asserted the motion to compel was required so that the insurer could obtain from documents filed in the employee's lawsuit, evidence about the employee's medical condition. The judge was aware of the comprehensive nature of the parties' submissions to the impartial medical examiner, Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(reviewing board may take judicial notice of contents of the board file), and at that point, the § 11A examination had already been performed by Dr. David C. Morley on March 22, 2018. Thus, despite the employee's failure to respond or file an objection to the discovery request and Motion to Compel, the judge had the discretion to deny the request made so late in the proceedings. Under the circumstances, we cannot say that the judge abused her discretion by denying the first Motion to Compel Production of Documents.

Nor can we say the judge abused her discretion in denying the second or third Motions to Compel, both of which were filed post hearing. Prior to the hearing, the insurer clearly had possession of the employee's complaint filed in the lawsuit and was cognizant of the allegations made in that complaint. Despite knowing these allegations, the insurer did not renew its Motion to Compel production prior to the hearing. The insurer did not file any motion to continue the lay portion of the testimony or to keep the testimonial portion of the hearing record open, either prior to, or at the conclusion of, the lay testimony on the day of the hearing. Rather, the insurer sought to compel discovery nearly one month after the hearing. We have suggested that normal discovery procedures are to be utilized during the interval between conference and hearing, which is precisely what the insurer claimed its request for discovery was designed to do, i.e., assist it in adequately preparing for the hearing. Arrington v. Tewksbury Home Painting, 14 Mass. Workers' Comp. Rep. 313, 315 n. 5 (2000)(observing party had nineteen months between conference and hearing to pursue discovery).

The judge acted within her discretion to control the conduct of the proceedings to prevent delay by acting favorably on motions that arguably, were not timely filed, as they were filed after the hearing. Discovery is an available tool to help prepare a party for trial. Absent circumstances such as a surprise revelation or an allegation of newly discovered evidence, none of which are present here, requests for post-hearing discovery relief should be assessed with caution so as not to be used as a vehicle to delay a proceeding that has already begun. In any event, because a complete rehearing must take place, the insurer is free to refile its more detailed motion to compel discovery prior to the hearing de novo. Of course, should it choose to do so, the judge must consider any such motion anew.

We agree with the insurer's claim that the judge erred by failing to make findings of fact supporting her ruling denying the insurer's first and second motions to strike the medical records of the employee's orthopedic surgeon, Dr. Michael Ackland. On the day of the hearing, the judge noted, "The insurer presented a motion to open the medicals, which I have allowed by virtue of complexity of this case." (Tr. 4; Dec. 4.) Thereafter, the parties submitted their additional medical evidence. The record closed on November 21, 2018. (Dec. 3.)

The employee submitted medical records, including the records of Dr. Ackland, whom the insurer sought to depose. (Dec. 2, Ex. 10.) On August 21, 2018, the insurer filed its first Motion to Strike the records of Dr. Ackland on the ground that his two-hour deposition fee of $5,500.00 was excessive. The insurer claimed that fee was "seven times" the fee for an impartial medical examiner's deposition and "twice" the fee for "similarly situated orthopedic surgeons." (Dec. 2, Ex. F for Identification.) As an exhibit appended to that motion, the insurer attached an August 17, 2018, letter from Dr. Ackland's office indicating that his deposition fee was non-negotiable. Id. at Ex. 1. On August 24, 2018, the judge denied the motion without making any findings.

On October 17, 2018, the insurer filed its second Motion to Strike the medical records of Dr. Ackland, again asserting that Dr. Ackland's deposition fee was excessive and rendered him constructively unavailable for deposition, thus requiring his records to

be stricken from evidence. (Dec. 2, Exhibit G for Identification.) This time, the insurer attached to its motion, the 2018 Fee Schedule of Dr. David C. Morley, Jr. as Exhibit 1, the March 2018 fee schedule of Dr. John R. Corsetti as Exhibit 2, and the August 17, 2018, letter from Dr. Ackland's office stating his deposition fee was non-negotiable. Id. The judge's decision indicates that "[n]o favorable action was taken" on this second motion because it was "either previously ruled upon and/or lacked any evidentiary substance." (Dec. 5.)

The judge's conclusion that there was no "evidentiary substance" to the insurer's second Motion to Strike, does not satisfy her duty to make findings of fact concerning her failure to rule on the second motion. This is especially true where the insurer, by appending other physicians' fee schedules to its motion, did more than baldly assert the fee was excessive. When presented with a Motion to Strike medical records or medical opinions on the ground that the physician's deposition fee is excessive, rendering the physician constructively unavailable, the judge must make specific findings of fact supporting the ruling on the motion.

> While not all rulings on motions require findings explaining the basis for the ruling, this one does. Cf. Kulisich v. Greater Lowell Family YMCA, 16 Mass. Workers' Comp. Rep. 270, 273 (2002)(judge not always obligated to make specific findings of fact when ruling on motion). Here, without specific findings, we cannot perform our appellate function and determine whether the correct rules of law were applied. See Bahr v. New England Patriots Football Club, Inc., 16 Mass. Workers' Comp. Rep. 248, 252 (2002); Praetz v. Factory Mut'l Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993); Antoine v. Pyrotector, 7 Mass. Workers' Comp. Rep. 337, 341 (1993).
>
> In ruling on the motion to strike, the judge must be mindful that the due process rights of the parties include the right to cross examine the opposing party's medical witnesses. See O'Brien's Case, 424 Mass. 16, 23 (1996); Haley's Case, 356 Mass. 678, 681 (1970); Begin's Case, 354 Mass. 594, 597-598 (1968); Gulino v. General Electric Co., 15 Mass. Workers' Comp. Rep. 378, 381 (2001)(judge's broad discretion in administration of his courtroom does not include authority to foreclose opportunity for parties to fully address medical issues by cross examining expert witnesses). The issue for the judge on recommittal is whether, under all the relevant circumstances, [the doctor's] $2,500 deposition fee is so

> unreasonable as to effectively deprive the employee of her cross examination right.

Richardson v. Chapin Center Genesis Health, 23 Mass. Workers' Comp. Rep. 233, 235-236 (2009). As we stated in Richardson, "the standard for determining whether [the doctor] was 'constructively unavailable' is whether the fee he demanded is unreasonable." Id. at 236 n. 5. While we expressly declined to rule that the § 11A deposition fee "should be the sole gauge of reasonableness" we held that the judge must make,

> a factual determination . . . after consideration of the particular circumstances of the case. . . . tak[ing] into account other factors relevant to the reasonableness of the fee. See Linthicum v. Archambault, 379 Mass. 381, 390 (1979)(listing factors to be considered in determining the amount of reasonable expert witness fees recoverable in a G. L. c. 93A action). Of particular significance in the judge's analysis is the time element. A $2,500 fee may qualify as reasonable if the deposition is an all day affair, whereas a $2,500 fee for less than an hour might be excessive.

Id. Should this issue arise in the de novo hearing, the judge must make findings of fact to address any ruling she makes on such a motion.

Lastly, the insurer takes issue with the judge's ruling that its § 1(7A) defense "lacks standing" and argues the judge erred by failing to conduct the requisite analysis required by G. L. c. 152, § 1(7A). The judge's analysis of the issue of causal relationship stated:

> I conclude from the medical evidence I adopted herein and the credible testimony of the Employee that there is a causal relationship between the Employee's complete incapacity for work since September 13, 2016 through this hearing.
>
> I rely on the medical evidence referred to herein in concluding that the Section 1(7A) affirmative defense by the Insurer has no standing in light of the opinion of Dr. Morley referenced.

(Dec. 11.)

We agree the judge erred as alleged by the insurer. The judge failed to conduct the required analysis regarding the insurer's § 1(7A) defense, Vieira v. D'Agostino

Assocs., 19 Mass. Workers' Comp. Rep. 50, 52-53 (2005), and her findings on that issue are insufficient for us to determine whether correct rules of law have been applied. Praetz, supra. Although the judge adopted Dr. Morley's opinion "[t]hat based on the history, physical examination and review of medical records, the work injury of September 13, 2016 is a major cause of the Employee's diagnosis, symptoms, need for treatment, and disability," (Dec. 11), her statement that the defense has "no standing" suggests that it was not a valid defense to begin with. Because the judge made no findings regarding the threshold questions she was required to address pursuant to Vieira,[7] we cannot determine what the judge's "no standing" comment means. Accordingly, when faced with the issue again in the hearing de novo, we direct the judge to make the threshold findings required by Vieira and to conduct her analysis accordingly.

Thus, we vacate the decision of the administrative judge and recommit the matter for a hearing de novo on all issues. "We reinstate the conference order, pending receipt of the judge's decision on recommittal." Carmody v. North Shore Medical Center. 33 Mass. Workers' Comp. Rep. ___ (4/17/19), citing Lafleur v. Department of Corrections, 28 Mass. Workers' Comp. Rep. 179, 192 (2014).

So ordered.

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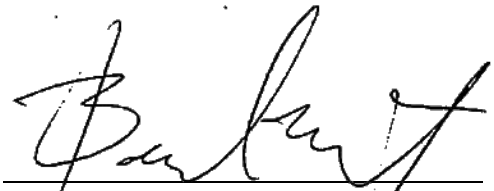
[7] Where § 1(7A) is appropriately raised by the insurer, the judge must make findings of fact addressing whether the employee has,

> 1) "a pre-existing condition, which resulted from an injury or disease not compensable under this chapter," which 2) "combines with" the . . . work injury ("a compensable injury or disease") "to cause or prolong disability or a need for treatment:" and, if so, 3) whether that "compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment." § 1(7A).

Vieira, supra at 52-53.

Catherine Watson Koziol
Administrative Law Judge



Bernard W. Fabricant
Administrative Law Judge

Martin J. Long
Administrative Law Judge

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