COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 004581-11**

Valerie Bonds	Employee
Boston School Department	Employer
City of Boston	Self-Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Koziol and Calliotte)

The case was heard by Administrative Judge Jacques.

APPEARANCES
Jeffrey P. Petrucelly, Esq., for the employee
John T. Walsh, Esq., for the self-insurer

HARPIN, J. The employee appeals from a decision denying and dismissing her initial claim for weekly and medical benefits in this exposure case. We reverse and recommit for further findings.

The employee worked for the Boston Public School Department as a teacher from 1989 until October 20, 2011, when she left due to respiratory distress. (Dec. 7.) Many of the buildings in which the employee worked were dilapidated, with leaks, water damage, exposed water pipes and poor soil quality. (Dec. 7.) The employee, who had no history of asthma, but who had smoked for thirty-four years, began to have respiratory difficulties in 2008. She found that her breathing problems occurred when she worked inside the school buildings, but that the symptoms slowly dissipated once she left the school and breathed fresh air. (Dec. 7.) The employee left work from February 14, 2011 to September 5, 2011, but when she returned found that her breathing problems also returned. (Dec. 7.) On October 20, 2011 the employee left work for good, as she felt she could no longer work in the environment that caused her breathing problems. (Dec. 7.) She has not returned to work since that day. (Dec. 8.)

The employee sought medical treatment with Dr. Christine Oliver, a pulmonologist at the Massachusetts General Hospital, who diagnosed her with rhinitis and work-related asthma. (Dec. 8; Ex. 10.) Her opinion, which the judge adopted, was that the employee's condition was at least aggravated,[1] if not caused, by the air quality at the schools in which the employee worked. (Dec. 8-9; Ex. 10[a].)

The judge denied and dismissed the employee's claim, finding that, while she had presented "persuasive evidence" that she was unable to work in the employer's buildings due to significant respiratory distress experienced in them, she had failed to prove that she was unable to "work at all." (Dec. 9.) She cited Dr. Oliver's opinion that the employee was capable of working "in an environment that is free of airborne irritants and free of factors likely to promote the growth of mold like water damage, leaks, dampness," and found the employee "could make a valuable contribution to the work force in an environment free of the irritants that cause her respiratory difficulties." (Dec. 10.) The judge concluded the evidence did not support the employee's claim of disability, and therefore, "I need not rule on the remaining issues." (Dec. 10.)

The employee appeals, alleging, among other issues, that the judge failed to decide the issue of liability, mischaracterized the medical evidence on the employee's disability, failed to consider whether the employee was partially disabled, and failed to determine whether the employee was entitled to medical benefits under § 30. We agree.

The issues of liability and entitlement to §§ 13 and 30 medical benefits were put in dispute by both parties, both in the documents filed at the time of the

[1] The self-insurer withdrew its initial raising of § 1(7A) as a defense. (Insurer's Hearing Memorandum. Rizzo v. MBTA, 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(permissible to take judicial notice of board file).

hearing, and in an acknowledgment before the judge. (Tr. I, 4.)[2] Yet the judge ruled only that the employee had failed to prove disability, despite finding that, in 2008, the employee "sought medical treatment and learned that she suffered from occupational asthma, triggered by exposure to irritants such as mold and dust mites." (Dec. 7.) The judge also adopted Dr. Oliver's opinion that the employee's condition had been aggravated, "if not caused by" her work at the schools. (Dec. 8.)

Parties are entitled to a decision that addresses all the issues in dispute, 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 (2010). See also Ballard's Case, 13 Mass.App.Ct. 1068, 1069 (1982). The judge here did not specifically find that the employee suffered an industrial accident, despite having made subsidiary findings pointing in that direction. Having decided the employee failed to prove her claim of disability, her conclusion that, "I need not rule on the remaining issues," (Dec. 10), was therefore in error. We have stated before that the extent of an employee's incapacity is not controlling on the issue of whether she is entitled to ongoing medical services. Monteiro v. Nelson Cleaning Services, 12 Mass. Workers' Comp. Rep. 147, 151(1998)("Nothing in § 30 requires the employee to be incapacitated from work in order to receive benefits for medical services related to the work injury."). For similar reasons a determination whether an industrial injury occurred is not dependent on whether the employee suffered a causally related disability. Instead, a claim based on environmental conditions at the workplace requires only the establishment, through competent expert opinion, that there is a causal relationship, to a reasonable probability, between the conditions of the work and the injury sustained. Perkins v. Eastern Transfer, Inc., 12 Mass. Workers' Comp. Rep. 370, 375 (1998). Because the judge adopted medical

[2] The transcript of the hearing on May 30, 2013 is denoted as "Tr. I," that on July 24, 2013 as "Tr. II," and that on October 22, 2013 as "Tr. III."

evidence causally relating the employee's condition to exposure at her workplace, we find, as a matter of law, that the employee suffered an industrial accident while working for the employer.

However, there are two potential dates of injury in this case. The first is February 14, 2011, when the employee first stopped working (and which date the employee claimed was her official date of injury [Employee br. 23]). The employee testified she was planning on leaving work on that date due to her breathing difficulties. However, she was also was assaulted that day by two students. She received compensation for the resulting injuries from the assault for the period up to her return to work on September 5, 2011. (Tr. I, 84-85.)[3] She then worked from September 6, 2011, until she left on October 20, 2011, which the judge found was due to the employee no longer feeling she could work in the environment that caused her breathing problems. (Dec. 7.) On recommittal the judge must determine which day was the employee's date of injury, February 14, 2011, or October 20, 2011, taking into account that the date of injury is usually the day of last exposure that bears a causal relationship to her incapacity, often the employee's last day of work. Ford v. O'Connor Constructors, Inc., 23 Mass. Workers' Comp. Rep. 145, 153 (2009).

The employee next argues the judge erred in not addressing whether she was disabled as of her "date of injury," February 14, 2011. (Employee br. 22.) As an initial matter, as noted above, the employee received compensation benefits after that date for the next six months due to an unrelated industrial injury; thus

[3] According to documents in the board file, Rizzo, supra, the employee was initially paid for five days of compensation by the self-insurer on a without prejudice basis for the neck and back injuries suffered in the altercation with two students. The self-insurer's termination thereafter resulted in the filing of a claim on June 16, 2011 for both the neck and back injuries and work-related asthma. The employee and the self-insurer reached an agreement (Form 113) on October 4, 2011 to pay § 34 benefits from February 14, 2011 to September 5, 2011 stemming solely from the neck and back injuries. The employee then filed a new claim on January 19, 2012, seeking § 34 benefits for "severe, incapacitating and disabling occupational asthma from work," alleging a date of injury of February 14, 2011, but a first date of disability of October 20, 2011.

there cannot be an award of weekly benefits for that time period for any exposure-related disability. Mizrahi's Case, 320 Mass. 733, 736 (1947)(no double recovery for the same incapacity, even if different injuries present). However, the employee argues for a finding of disability, not just for the period until she returned to work, but also from her last day worked, October 20, 2011, up at least to the date of the judge's decision, February 28, 2014. (Employee br. 23.)

The employee is correct that the judge did not make findings on disability covering part of the period in question, specifically from the last day worked to October 18, 2013. On that date the employee's treating physician, Dr. Oliver, was of the opinion the employee could work "in an environment that is free of airborne irritants and free of factors likely to promote the growth of mold like water damage, leaks, dampness." (Dec. 9; Tr. III, 18-19, 52-53, 79-80; Dep. 52-53.) The judge therefore concluded the employee "could make a valuable contribution to the work force in an environment free of the irritants that cause her respiratory difficulties." (Dec. 10.) On recommittal, the judge must make findings, based on the admitted medical evidence and the employee's testimony, as to the extent of causally related disability, if any, from October 20, 2011, forward.

The employee next alleges the judge failed to consider whether the employee was and is partially disabled, as the judge never considered the vocational factors of Scheffler's Case, 419 Mass. 251, 256 (1994), and Eady's Case, 73 Mass.App.Ct. 724, 727 (2008), in determining that the employee was able to return to full work in an irritant free environment. We agree. The only "vocational factors" which the judge considered in making her disability determination were that the employee was "educated, articulate, professional, outgoing and friendly." (Dec. 10). These, of course, are personal attributes, only one of which, "educated," is considered to be a vocational factor. On recommittal, the judge is to consider the actual vocational factors of medical limitations, age, education, employment history, transferable skills, and the market for the

employee's skills, Edy, supra, in determining the extent of the employee's work capacity.

We find the employee's other issues to be without merit.

To recap, we hold the employee suffered an industrial injury while working for the employer in 2011. The matter must be recommitted for further findings on the actual date of injury, on the extent of disability, if any, and on the employee's incapacity for work, taking into account the appropriate vocational factors. As the judge who originally heard this case is no longer on the board, we refer this matter to the senior judge for reassignment to a new administrative judge. That judge may take new testimony as necessary, and must consider all the medical evidence of record.

Because the employee appealed the hearing decision and prevailed, an attorney's fee may be appropriate under § 13A(7). If such fee is sought, employee's counsel is directed to submit to this board, for review, a duly executed fee agreement between counsel and the employee. No fee shall be due and collected from the employee unless and until that fee agreement is reviewed and approved by this board.

So ordered.

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William C. Harpin
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

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Carol Calliotte
Administrative Law Judge

Filed: **February 24, 2016**