COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 004188-15**

Victor Diaz Employee
M.B.T.A. Employer
M.B.T.A. Self-insurer

REVIEWING BOARD DECISION
(Judges Calliotte, Fabricant and Koziol)

The case was heard by Administrative Judge Williams.

APPEARANCES
Bernard J. Mullholland, Esq., for the employee
Justin R. Veiga, Esq., for the self-insurer at hearing
Thomas R. Richard, Esq., for the self-insurer on appeal

CALLIOTTE, J. The self-insurer appeals from a decision awarding the employee § 34 temporary total incapacity benefits from June 29, 2015, to date and continuing, and §§ 13 and 30 medical benefits from the date of injury, February 13, 2015, forward. We affirm the decision, and address four of the self-insurer's five arguments.[1]

On February 13, 2015, the employee, a fifty-one year-old M.B.T.A. patrolman, slipped and fell on snow in the course of his employment. He broke his fall with his right arm, which caused him to feel severe pain in his right elbow, as well as pain in his forearm. (Dec. 3, 4.) Upon returning to his assigned substation, he reported the injury. (Dec. 4-5.) Despite being in pain, he returned to work. However, on February 17, 2015, he left work due to the injury. The insurer paid § 34 benefits until May 11, 2015, when, after undergoing physical therapy and a cortisone injection to his elbow, the employee returned to a full-time light duty position involving writing, file-keeping and

[1] We summarily affirm the decision as to the self-insurer's first argument that the employee failed to timely appeal the conference order.

keyboarding. Because he was receiving only his base pay at the light-duty job,[2] the insurer paid § 35 benefits from May 11, 2015, until June 29, 2015, when the employee left work again, due to worsening right elbow symptoms. (Dec. 5.) The employee saw an orthopedic physician, Dr. Kai Mithoefer, who, based on his physical examination and the results of an MRI, took the employee out of work as of June 29, 2015. (Dec. 5-6.) In early November 2015, Dr. Mithoefer indicated the employee could attempt to return to work again, but only on a part-time light-duty basis, which the employee understood meant with no use of his right arm. However, the employee was told by authorities at the M.B.T.A. that there was no part-time light duty work available for a patrolman, and thus he did not go back to work.[3] (Dec. 6.)

On December 15, 2015, the employee filed a claim for § 34 benefits for an injury to his right elbow, beginning on June 29, 2015, as well as for §§ 13 and 30 medical benefits as of the date of injury, February 13, 2015. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2016)(permissible to take judicial notice of documents in Board file). At the § 10A conference on March 14, 2016,[4] a different administrative judge allowed the self-insurer's motion to join a complaint for discontinuance. Rizzo, supra. Following the conference, that judge denied the self-insurer's complaint, and ordered it to pay § 34 benefits from June 29, 2015, to March 14, 2016, and § 35 benefits thereafter. Both parties appealed to hearing. (Dec. 2.)

On May 18, 2016, Dr. Hillel Skoff, a hand and upper extremity specialist, examined the employee pursuant to § 11A. He diagnosed the employee with chronic lateral epicondylitis, which had not responded to physical therapy or injections. Dr.

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[2] The employee's base pay was less than his average weekly wage prior to his injury because he did not receive details and overtime while working light duty. (Dec. 5, citing Tr. 21-23.)

[3] Prior to the detailed findings of fact summarized above, the judge set out, under the heading "Procedural Matters," and the subheading "Conference and Appeal," two sentences containing information inconsistent with his later findings of fact. (See Dec. 2.) The self-insurer takes issue with these findings, and its argument is discussed *infra*.

[4] At the conference, the employee's Conference memorandum indicated he injured his "right (major) arm, elbow & wrist." Rizzo, supra.

Skoff opined that the employee was now a surgical candidate for the treatment of chronic refractory lateral epicondylitis, and that he should also be evaluated for radial tunnel syndrome, which could require a separate release surgery. He believed that it was "certainly conceivable" the employee's elbow trauma had caused his right hand numbness, a problem which could be addressed at the time of the elbow surgery. Further, Dr. Skoff opined there was a direct causal relationship between the employee's work injury and his clinical condition and need for treatment, and that he "remains totally disabled until his issues are addressed." (Dec. 6-7, quoting Statutory Ex. 1.) The judge adopted Dr. Skoff's opinions. (Dec. 7.)

The judge also adopted the opinion of Dr. Olarewaju Oladipo that the employee suffered from " 'persistent right elbow pain; right tennis elbow, tendinopathy; right extensor carpi radialis brevis muscle tear' "; that all diagnoses were causally related to his work injury, which was a major cause of the symptoms affecting his right elbow and forearm, and of his need for treatment; and that the employee was temporarily totally disabled. (Dec. 7, quoting Employee Ex. 3, January 6, 2016 report of Dr. Oladipo.)

Based on these medical opinions, the employee's good faith attempts to return to work (which only exacerbated his condition), his lack of response to conservative care and need for surgery, his increased pain, and the restrictions on his activities of daily living, the judge found the employee totally disabled from work in the open labor market, and with his employer. (Dec. 7-8.)

The judge found the self-insurer had not met its burden of production to properly raise § 1(7A), with respect to a pre-existing right shoulder condition, as there was no medical evidence the right shoulder problem, which had been asymptomatic for over two years before the work injury to the elbow, "combined" with that industrial injury to cause or prolong disability or a need for treatment. See MacDonald's Case, 73 Mass. App. Ct. 657, 659-660 (2009)(combination an essential element of insurer's burden of production when it seeks to raise affirmative defense of § 1[7A] to impose heightened burden of proof regarding causation on employee). Nonetheless, the judge adopted Dr. Oladipo's

opinion that the employee's work injury is a major cause of his ongoing disability and need for treatment for the symptoms affecting the employee's right elbow and forearm. (Dec. 9.)

The judge ordered the self-insurer to pay the employee § 34 benefits from June 29, 2015, to date and continuing. (Dec. 10.) In addition, the judge found the employee entitled to "reasonable, necessary[5] and related medical treatment for the right upper extremity including but not limited to persistent right elbow pain; right tennis elbow, tendinopathy and right extensor carpi radialis brevis muscle tear." (Dec. 9.) He then ordered the self-insurer to pay "medical benefits for medical, hospital, physical therapy and pharmaceutical services for treatment for upper right extremity from February 13, 2015," to date and continuing. (Dec. 10.)

We address the self-insurer's second and fourth arguments together, as they overlap. The self-insurer argues that, although the judge allowed its "motion for additional medical evidence and/or for a finding of inadequacy," he erred by failing to specifically find that the impartial report was inadequate, and, in addition, misconstrued its motion as one for "gap" medical evidence. The self-insurer contends this alleged error led to the judge's error in relying on Dr. Oladipo's report. And, because the judge did not adequately convey the extent of "gap" medicals he was allowing, the self-insurer maintains it was deprived of the opportunity to submit additional medical evidence disputing the § 11A opinion. (Self-insurer br. 9-11; 12-13.)

We hold that the self-insurer has waived these arguments. In allowing the unopposed motion, the judge clearly stated that he considered it to be one for "gap medicals," and defined the gap period as being "from the time of the initial filing of the claim to January 24, 2017, the date of hearing." (Tr. 5-6.) He acknowledged that the

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[5] Again, we note there is no statutory support for the often-cited "reasonable and necessary" standard for medical treatment. Rather G.L. c. 152, § 30, provides that "the insurer shall furnish to an injured employee adequate and reasonable health care services and medicines, if needed, together with the expenses necessarily incidental to such services . . . ." See Donovan v. Keyspan Energy Delivery, 22 Mass. Workers' Comp. Rep. 337 n.1 (2008).

period was "outside the traditional term of gap medicals." (Tr. 5-6.) See Spencer v. JG MacLellan Concrete Co., 30 Mass. Workers' Comp. Rep. 145, 149 (2016)(gap medicals not limited to the period prior to the § 11A examination, but may include medicals for the post-examination period as well). The self-insurer did not object to the judge's failure to specifically rule on inadequacy. See Spencer, supra (rejecting employee's argument the judge erred by admitting additional medical evidence without finding inadequacy or medical complexity, where insurer's motion was for finding of inadequacy on issue of present disability).[6] It did not object to the judge's definition of the gap period, or seek clarification on the ruling at hearing, or at any time thereafter. It did not object to the admission of the employee's additional medical evidence, which included Dr. Oladipo's report (which was well within the gap period as defined).[7] And it did not seek to submit any additional medical evidence which the judge refused to admit,[8] or make an offer of proof as to any medical evidence it wished to submit. Accordingly, the self-insurer has waived these arguments. See 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) (" 'Objections, issues, or claims—however meritorious—that have not been raised' below, are waived on appeal").

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[6] The self-insurer does not state specifically what its motion sought, and points out that the motion was never uploaded to OnBase. However, it attached a copy of the alleged motion to its appellate brief. (Self-insurer br. 10.) The motion asks that additional medical evidence be allowed to address "the employee's present disability and work capacity."

[7] Moreover, even if there was any error in the judge's adoption of Dr. Oladipo's opinion for any purpose outside a determination of present disability, it was harmless. Dr. Oladipo's and Dr. Skoff's opinions were not inconsistent in any meaningful way. The judge's adoption of Dr. Oladipo's "a major cause" opinion was unnecessary and irrelevant because the judge found § 1(7A) did not apply. (Dec. 9.) Dr. Skoff's "direct" causal relationship opinion was sufficient. (Dec. 6-7.)

[8] In fact, the only additional medical evidence the self-insurer submitted was related to the employee's prior shoulder condition for the years 2012-2013. The judge admitted those records. (Dec. 2; Insurer Ex. 1.)

Next, the self-insurer argues that the judge's decision is arbitrary and capricious because he inaccurately summarized the procedural history of the claim at the beginning of his decision. Under the subheading "Conference and Appeal," the judge wrote,

> The employee claimed he suffered an injury at work on November 15, 2013, and first reported that alleged injury on December 2, 2013. He was placed on benefits in the pay without prejudice period and was paid Section 34 benefits through April 15, 2014 at the rate of $943.69 per week.

(Dec. 2.) The self-insurer correctly points out that none of this information is accurate. It contends that the judge confused the facts of this case with another, and that "it may be rationally concluded that he continued to do so throughout his analysis, which ultimately influenced his final decision." (Insurer br. 12.) The employee does not dispute that the information in the two sentences at issue is incorrect, but maintains that these findings were harmless error (or even scrivener's error[9]) because they were not repeated throughout the rest of the decision, and had absolutely no bearing on the judge's ultimate decision. We agree with the employee.

Here, the self-insurer fails to point out how the incorrect statements regarding the date of injury, the employee's reporting of the injury, the payment history and rate of pay influenced the decision. Indeed, there is absolutely no indication the judge factored the erroneous information into his decision at all. See King v. APA Transport Inc., 29 Mass. Workers' Comp. Rep. 81, 86 (2015)(harmless error where judge did not rely on allegedly erroneously admitted exhibits). Cf. O'Rourke v. New York Life Insurance, 30 Mass. Workers' Comp. Rep. 303, 309 (2016)(errors not harmless where they appear to have been factors in judge findings). The self-insurer does not challenge the detailed findings of fact regarding the procedural history, which the judge made thereafter, i.e., the February 13, 2015 date of injury, the employee's reporting of the injury that day, or the various periods and types of benefits the employee was paid prior to the conference

[9] The employee posits that the erroneous sentences "are most likely a product of a failure by the Administrative Judge to fully delete from his word processing decision template, information pertaining to another decision he was writing or had previously written." (Employee br. 7.)

order. (Dec. 4-6.) These factual findings are entirely consistent with the evidence adduced at hearing, and it is on those facts that the judge's conclusions were premised. This is clearly not a situation like that in Wiinikainen v. Epoch Senior Living, Inc., 32 Mass. Workers' Comp. Rep. ___ (February 14, 2018), where we held that the judge's misstatement and misunderstanding of the procedural history of the case led to his failure to address the insurer's complaint for discontinuance, thus requiring recommittal. Here, the judge addressed all issues raised based on the undisputed procedural history as correctly stated everywhere else in the decision. Those sentences regarding the initial procedural posture of the case were, as the employee points out, simply an anomaly, and did not factor into the decision at all. They are thus harmless error.

Finally, the self-insurer maintains the judge's order for "medical, hospital, physical therapy, and pharmaceutical services for treatment for upper right extremity," (Dec. 10), was arbitrary and capricious, insofar as it requires treatment for the *entire* upper right extremity, which, the self-insurer maintains would include the employee's right shoulder, arm, wrist and hand. (Insurer br. 13.) The employee concedes the judge's actual order of §§ 13 and 30 benefits could have been more specific, but maintains that, when viewed in its entirety, the decision is clear that the causally related conditions covered are all related to the elbow and forearm, and do not include the shoulder. (Employee br. 10-12.) We agree with the employee.

The judge found that, when the employee fell, he experienced "pain in his right elbow and forearm areas;" (Dec. 4); that his treatment and diagnostic testing was for his right elbow; id. at 5, 6-7; and that his return to work exacerbated his right elbow symptoms. Id. at 5. Dr. Skoff and Dr. Oladipo, whose opinions the judge adopted, diagnosed injuries to the employee's right elbow and forearm. The judge clearly found that there was no medical evidence that "the employee's prior right shoulder problem, which had already been asymptomatic for more than two years as of February 13, 2015, in any way 'combined' with [his] right elbow and upper forearm injury . . . to 'cause or prolong[] disability or need for treatment.' " (Dec. 9; see also id. at 4.) The employee

neither claimed nor argued he suffered an exacerbation of his right shoulder condition. And finally, on the page before the actual order for §§ 13 and 30 benefits, the judge made specific findings that the employee is entitled to medical treatment for the "right upper extremity including but not limited to *persistent right elbow pain; right tennis elbow, tendinopathy and right extensor carpi radialis brevis muscle tear*." (Dec. 9.) All of these diagnoses are specifically related to the elbow injury. While it would have been preferable for the judge to specifically indicate that the award of medical benefits for the "right upper extremity" did not include benefits for the shoulder or other unrelated body parts, the decision as a whole is clear that the only benefits ordered are those which are causally related to treatment of the claimed right elbow and forearm.

Accordingly, we affirm the decision. The self-insurer shall pay employee's counsel a fee pursuant to G.L. c. 152, § 13A(6) in the amount of $1,680.52.

So ordered.

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Carol Calliotte
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

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Catherine Watson Koziol
Administrative Law Judge

Filed: ***April 1, 2019***