COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 036961-09**

Christine M. Cannava	Employee
City of Medford	Employer
City of Medford	Self-Insurer

REVIEWING BOARD DECISION
(Judges Harpin, Fabricant and Long)

The case was heard by Administrative Judge Taub.

APPEARANCES
Peter Georgiou, Esq., for the Employee
Mary Ann Calnan, Esq., for the Self-Insurer at hearing and on appeal
Courtney J. Powell, Esq., for the Self-Insurer on appeal

HARPIN, J. Both parties appeal the recommitted decision of the administrative judge awarding the employee § 35 partial incapacity benefits, based on two separate assigned earning capacities. We reverse one of the earning capacities and affirm the remainder of the decision.

The employee worked as a full time elementary school art teacher for the City of Medford from 1976 until her retirement in June, 2010. (Dec. II, 2.)[1] Beginning in September, 2009, the employee testified she developed a strain in her right shoulder after daily reaching to place drawings and paintings in an overhead rack, using her right arm to demonstrate painting and drawing techniques at an easel, and using her right arm to operate the heavy blade of a paper cutter. (Dec. II, 3.) She also developed pain in her right arm above the elbow after using the paper cutter, which became worse over time. Id. On November 2, 2009 the employee felt a sharp pain in that arm while using the

[1] The judge's first decision will be referred to as "Dec. I," and the second, recommitted decision, currently under appeal, as "Dec. II."

paper cutter, but did not report the incident at that time, or tell anyone at the school that she thought she had developed a work-related shoulder condition. Id. The employee continued working until her retirement at the end of the school year in 2010. Id. It was not until September 13, 2010 that she reported a shoulder problem related to her work, filing an incident report on that date with the principal of the school. (Dec. II, 4.)

On November 4, 2009, after telling her primary care physician of her right arm pain, the employee was referred to orthopedic physician Dr. Jeffrey Zilberfarb, who diagnosed right shoulder rotator cuff tendinitis, and prescribed a course of physical therapy that ended in January, 2010. (Dec. II, 3.) She returned to Dr. Zilberfarb's office in August, 2010, saw a nurse practitioner, and then had a right shoulder MRI. Id. Beginning on September 13, 2010, she came under the care of, Dr. Ronald Nasif, another orthopedic surgeon, and has remained in his care. (Dec. II, 4.) In addition to treating the employee for her right shoulder problem, Dr. Nasif ordered a cervical MRI in February, 2012, which showed multiple level degenerative disc and foraminal degeneration and stenosis, from C4 through C6, mostly right-sided. Id. He has continued to treat the employee for her shoulder pain and right-sided neck pain, prescribing pain medications until the end of January, 2012, but thereafter prescribing only over-the-counter anti-inflammatories. (Dec. II, 4-5.)

At the first hearing, in July, 2011, the employee testified she was in constant and worsening pain since September, 2009, with the pain increasing when she used her right arm grocery shopping, cooking, and housekeeping. (Dec. II, 4-5). At the second hearing, in March, 2014, the employee stated her pain level had improved somewhat over time because she was using her shoulder less, was not working, and was more careful. Regardless, her pain increased with activity. Id.

In his first decision, the judge denied the employee's claim, adopting the impartial physician's opinion that, while her condition was the result of a pre-existing deterioration in her right shoulder and minor exacerbation from her work activities, her work activities were not a major or predominant causative factor for what he found on his examination. (Dec. I, 6; Dec. II, 7.) On appeal, we vacated and recommitted that decision, noting that

the judge used the wrong standard of causation. Cannava v. City of Medford, 27 Mass. Workers' Comp. Rep. 27 (2013). Because the employee's pre-existing condition was an "age-related deterioration," we held that the use of the G. L. c. 152, § 1(7A) standard for combination injuries was not appropriate,[2] and the "as is" standard should have been used to determine if the employee's present condition was related to her alleged industrial accident on November 2, 2009. Cannava, supra, at 30. However, we specifically noted in the recommittal that, as the judge's ruling on liability had been "inextricably intertwined" with both his vague findings on the employee's credibility and on the § 11A physician's adopted opinions of no "major" causal relationship, the judge had to consider the "threshold issue of liability" with the correct standard of causal relationship. Id. at 30-31.

Following the recommittal, the judge issued a second decision in which he noted the record was updated via further testimony and medical documentation. (Dec. II, 1-2.) This time the judge adopted the opinion of the employee's treating orthopedic surgeon, Dr. Ronald Nasif, that her chronic right shoulder and neck pain, as well as her right shoulder rotator cuff tear and cervical disc derangement, were causally related on an "as is" basis to her work activities, "most significantly her injury of November 2, 2009." Id. at 8. The judge then adopted Dr. Nasif's April, 2012, opinion that the employee "remained totally disabled from labor or from her previous occupation of teaching," which he interpreted to mean that the employee could not return to her prior job as an art teacher, or to any position requiring strenuous labor. Id. He did find, however, that because she had a master's degree in teaching and had the capacity to tutor reading, which was very light work that was not physically demanding, she was partially incapacitated. Id. He assigned the employee an earning capacity of $500.00, beginning on September 29, 2010 to September 25, 2012, id., and an earning capacity of $750.00

[2] See Blais v. BJ's Wholesale Club, 17 Mass. Workers' Comp. Rep. 187, 192 (2003)(age-related degeneration does not satisfy an insurer's burden of production for a non-compensable prior condition under § 1[7A]).

thereafter, due to Dr. Nasif's addressing her disability after that date in "much milder terms." (Dec. II, 9). He then awarded the corresponding § 35 benefits. (Dec. II., 10).

The employee raises an issue regarding the increase in earning capacity on September 25, 2012. She contends the judge mischaracterized evidence to increase the earning capacity, and also argues there is no foundation for an earning capacity beyond the $500.00 first assigned. We agree.

A judge must always anchor his findings in the adopted medical and factual evidence, otherwise the findings are without support and cannot stand. Rocha v. Heavy Civil Construction LLC, 30 Mass. Workers' Comp. Rep. 325, 327 (2016). Here the judge attempted to ground his findings on earning capacity in the adopted reports of Dr. Nasif and his interpretation of the employee's testimony. However, Dr. Nasif did not change his opinion on the employee's work capacity in any substantial way throughout the four years of his treatment. He began by noting, on September 29, 2010, that the employee had complaints of right shoulder pain, with "much guarding, with abduction limited to 70º before she withdraws with increasing complaints." His opinion on her work capacity was summed up as follows: "She is avoiding all forms of reaching, lifting until further notice." (Employee Ex. 2.)[3] For the next two years he found her to be totally disabled. (Employee Ex. 2, reports of June 8, 2011, July 7, 2011, August 15, 2011, August 31, 2011, January 9, 2012, February 8, 2012, and March 1, 2012.) On April 12, 2012, the doctor expanded somewhat on his opinion, stating that "[s]he remains totally disabled from labor or from her previous occupation of teaching." (Employee Ex. 2, report of April 12, 2012.) The judge seized on this wording, finding that the use of the word "remains" meant that all of Dr. Nasif's prior total disability opinions (and his later one of May 18, 2012) were statements of a partial disability, that the employee "could not perform her prior work and could not perform any strenuous work. (Dec. II, 8.) He then

[3] The judge adopted in his second decision the medical evidence admitted in the first decision, without renumbering the exhibits. (Dec. II, 2.) The reports of Dr. Nasif extended in the first decision only to January 9, 2012. (Dec. I, 1.) The judge allowed the updating of the medical record for the second decision, allowing into evidence Dr. Nasif's reports up through February 6, 2014. (Dec. II, 2.)

found the employee to be partially incapacitated from September 29, 2010, to the present, based on his interpretation of Dr. Nasif's reports and the employee's condition of a "talented and highly educated and trained person for whom possibilities exist for very light work." (Dec. II, 8.)[4]

The problem with the decision lies in what the judge did with the rest of Dr. Nasif's reports. He found that by September 26, 2012, the doctor "addressed the employee's disability in much milder terms," by not specifically speaking "of the employee as disabled." (Dec. II, 9.) The judge found there had been an "evolution" in the doctor's disability opinion, to the point that on February 6, 2014, the doctor found the employee "remains at least partially disabled from the lifting, pulling, and other classroom labors as an art teacher until further notice." (Employee Ex. 2, report of February 6, 2014; Dec. II, 9). This "evolution," coupled with the judge's finding that the employee testified her pain level "had improved over time," led to a finding that the employee's earning capacity had improved by 50%, from $500.00 to $750.00. (Dec. II, 9.) However, there was no evidence to support a finding of such an improvement.

Dr. Nasif did indeed find the employee to be partially disabled from working as an art teacher in his February 6, 2014 report, but he also noted that the employee "continues to experience pains deep within her right shoulder and upper arm," and that "[s]he continues to be unable to lift or perform any stressful activity with her right upper extremity. Even simple household activities – cooking, cleaning – are compromised. She complains of difficulty sleeping, has never returned to teaching since her injury." (Employee Ex. 2, report of February 6, 2014.) This description of the employee's condition is consistent with that described by the doctor from at least April 12, 2012. On that date he noted the employee had complaints of "persistent pain of right shoulder, right side of neck," with cervical rotation limited on the right to 40º and pain radiating deep to

[4] The employee does not appeal on the issue whether the judge mischaracterized the doctor's "total disability" opinions in his reports to find a partial incapacity, thus we do not address it. Blanchette v. Town of Marblehead, 30 Mass. Workers' Comp. Rep. 229, 232 (2016)(failure to raise issue on appeal waives it); Oral Argument Tr., 6 (employee's attorney stated, regarding the $500.00 earning capacity, "I'm not going to contest that. There is probably a basis.")

the right shoulder. (Employee Ex. 2, report of April 12, 2012.) One month later the employee reported she had the same "persistent pains of right shoulder, right side of neck," with 50% loss of cervical rotation in both directions. (Employee Ex. 2, report of May 18, 2012.) By July 20, 2012, the employee continued to complain of pain in her right shoulder and neck, with cervical rotation on the right limited to 45º. (Employee Ex. 2, report of July 20, 2012.) On September 26, 2012 the doctor noted the employee "returns with complaints of persistent progressive pains and stiffness about the neck," with right shoulder pains as well, and the same limitation on right sided cervical rotation. He was of the opinion her cervical condition was progressive. (Employee Ex. 2, report of September 26, 2012). Over the next year the employee continued to report persistent right shoulder and right sided neck pain, with pain on right sided cervical rotation beyond 45º, and pain radiating deep into the right shoulder. (Employee Ex. 2, reports of February 19, 2013, and September 26, 2013.)

The positive "evolution" found by the judge in the employee's condition is not borne out by the medical records he adopted. Instead, they demonstrate a consistent record of ongoing right shoulder and neck pain and limitations in movement. This mischaracterization of the medical record cannot be used to support the finding of an increase in earning capacity beginning in September, 2012.

In addition, the judge used the employee's alleged testimony that her pain level had improved over time as further support for increasing her earning capacity. (Dec. II, 9). However, the judge made the earlier finding that the employee's testimony about her improvement in pain level was "because she was more careful and, not working, used her shoulder less. She, nevertheless, was clear that her pain had not gone away completely and still increased with activity – the more use, the more pain."[5] (Dec. II, 4.) Thus the "improvement" in pain was due to inactivity, with the pain coming back once the employee engaged in activities requiring the use of her arm.

[5] The employee testified in the second hearing that her pain level had changed, "in the fact that I don't have to use it, only for different things that I'm trying to get done. But I'm currently not working. I'm not in a labor intense situation. So I can almost take more time to do things and try to be more careful." (Tr. II, 21).

Given that the actual medical record and the employee's testimony support only a finding of no change in the employee's condition from 2012 to 2014, we reverse the finding of a $250.00 increase in earning capacity on September 26, 2012. Soucy v. Beacon Hospice, Inc., 28 Mass. Workers' Comp. Rep. 207, 212 (2012); Rooney's Case, 316 Mass. 732, 739-740(1944)(recommittal unnecessary when evidence can support only one result).

Next, we address the self-insurer's arguments on appeal. The self-insurer first states that the two hearing decisions issued by the judge are internally inconsistent and therefore arbitrary and capricious. (Self-insurer br., 5-14.) Although we acknowledge the self-insurer's concern that the second decision changed dramatically, we disagree that it is arbitrary or capricious. Upon remand, we directed the judge to review the medical evidence under the "as is" standard. Once the judge did so, it was completely possible that the result might change. Regardless of the outcome, the judge had to provide subsidiary findings that supported his ultimate findings and provide a reasoned analysis of the evidence that supported any change he made from the first decision. Cassie v. Wellesley Dept. of Pub. Works, 12 Mass. Workers' Comp. Rep. 1, 4 (1998)(change of result in recommittal decision requires either admission of new evidence or explanation, otherwise new decision is arbitrary and capricious). Here, the judge did just that. We see no error on this point.[6]

The self-insurer then contends the judge impermissibly expanded the parameters of the dispute when he found the employee suffered not only a work-related right shoulder injury, but also a work-related injury to her neck. (Self-insurer br., 17-18; Dec. II, 7-8). It argues that the only claim before the judge was for a right shoulder injury, and the employee not only failed to amend her claim to include a neck injury, but also "did

[6] The self-insurer argues that our decision vacating the judge's first decision, because it was tainted by an error of law, was "not so based on the overwhelming weight of the evidence which challenges the veracity of the Employee's testimony." (Self-insurer br. 10.) In essence, it asks us now to reverse our earlier decision based on an argument it already made at that time and that it is now repeating. We decline to do so.

not elicit a shred of testimony regarding a neck injury arising out of and in the course of employment . . . ." Id.

The problem with the self-insurer's contention is that the parties tried the issue of whether the employee suffered a work-related neck injury by consent. See Lafleur v. Dep't of Corrections, 28 Mass. Workers' Comp. Rep. 179, 186 (2014), and cases cited. The judge, in the first decision, specifically referred to Dr. Nasif's reports, in which the doctor recommended a cervical MRI in April, 2011, due the employee's "additional complaints of pain and stiffness in the neck and upper back." (Dec. I, 5.) The judge then noted the doctor gave diagnoses on January 9, 2012, of chronic rotator cuff tear of the right shoulder, *chronic cervical strain and radiculitis, and the possibility of a herniated cervical disc*. Id. The judge concluded his review of Dr. Nasif's reports by noting the doctor "opined that the ongoing symptoms about the right shoulder *and neck* were the causal result of a work injury sustained in November 2009." Id., (emphasis added.) While the judge did not adopt Dr. Nasif's reports and dismissed the claim based on an erroneous application of § 1(7A), Cannava, supra, it was clear from his findings and review of the medical record that the employee had submitted medical evidence tying a causally related neck condition to her disability.

In the second decision, the judge adopts Dr. Nasif's opinions on disability, and more importantly, on the causal relationship of the employee's "chronic and continuing pains of the neck and right shoulder, as well as her rotator cuff tear of the right shoulder and cervical disc derangement," to the injury of November 2, 2009. (Dec. II, 8.) The self-insurer was on notice that the employee, through her submitted medical records, was alleging a cervical, as well as a shoulder injury, in both hearings.[7] In addition, the self-insurer did not object to the admission of Dr. Nasif's reports containing those opinions at either hearing. (Oral argument Tr. 27). The self-insurer's failure to object, or to call the judge's attention to the inclusion in the admitted records of a causally related diagnosis, which it now argues was not part of the employee's claim, effectively waives its

[7] The employee also testified in the second hearing that her home therapy consisted of heating packs, a travel pillow, a vibrating shoulder pad, and a "cervical traction piece." (Tr. II, 19)

argument now raised for the first time on appeal. Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001). Moreover, these same factors support our holding that the parties tried the issue of the neck injury by consent. Lafleur, supra, citing Freeman v. Univ. of Massachusetts, 18 Mass. Workers' Comp. Rep. 138, 140 (2004)("injury not claimed was tried by consent where insurer failed to object to employee's examination of impartial physician about causal relationship of that incident, and engaged in cross-examination of impartial physician regarding incident"). See also Spadola v. TGI Fridays, 26 Mass. Workers' Comp. Rep. 285, 289 (2012)(failure to object to admission of medical records waives any issue raised on appeal as to the content of the records). Cf., Ayotte v. Lahey Clinic Hospital, 29 Mass. Workers Comp. Rep. 12, 124 (2015), where we held that a judge's award of benefits for a condition not identified, claimed or covered in admitted evidence was error, requiring recommittal. Here, however, the condition was clearly identified and covered in several adopted medical reports.

In its third issue the self-insurer argues the judge committed error in failing to properly weigh the § 11A examiner's opinion, in light of the holding in Zerofski's Case, 385 Mass. 590, 594 (1982). It argues the employee's reaching and using a paper cutter were "too common among necessary human activities to constitute identifiable conditions of employment." (Self-insurer br. 20-22.) It further argues that even with the reviewing board's rejection of the impartial doctor's (and the judge's) use of the § 1(7A) "a major" standard in favor of the correct "as is" standard, "it is error [for the judge] to directly contradict his initial findings without explanation of the basis for rejecting the impartial opinion on recommittal apart from its failure to utilize the appropriate legal standard." Id. at 20.

The self-insurer correctly notes that the weight to be given duly admitted evidence is for the judge alone to determine. Pilon's Case, 69 Mass.App.Ct.167, 169 (2007) Yet it then asks us to effectively re-weigh the judge's rejection of the impartial examiner's opinion, based on a very broad reading of Zerofski that is not warranted. In Zerofski, the analysis of "an identifiable condition that is not common and necessary to all or a great many occupations" is not reached if there is an identifiable incident at work, as opposed

to a period of repetitive activities over time. Id, at 594-595. In the present case, the judge, after finding that the employee's condition had arisen out of repetitive overhead reaching, regular use of her right arm in an elevated position at an easel, and the everyday use of her right arm at a paper cutter, also found the employee had specific incidents in September, 2009 and on November 2, 2009, "when she experienced pain while using the paper cutter." (Dec. II, 7). This combination of repetitive movement and two specific incidents takes the case out of a Zerofski analysis. Flamino v. Central Motors Inc., 17 Mass. Workers' Comp. Rep. 45, 47 (2003).[8] The judge thus committed no error in rejecting the impartial examiner's opinion without performing a Zerofski analysis.

Finally, the self-insurer argues the reviewing board's determination in the first decision regarding the application of §1(7A) was contrary to law. (Self-insurer br., 22 – 29.) It argues that our statement in Cannava, supra, at 29, that "pre-existing conditions attributable to 'age-related deterioration' are insufficient to satisfy the insurer's burden pursuant to § 1(7A)," "impermissibly expanded the principle discussed first in Errichetto v. Southeast Pipeline Contractors, 11 Mass. Workers' Comp. Rep. 88, 91 (1991), and later misinterpreted in Blais v. BJ's Wholesale Club, 17 Mass. Workers' Comp. Rep. 187 (2003)." (Self-insurer br. 22). The gravamen of its argument appears to be that, while age *alone* is an improper pre-existing condition for a § 1(7A) analysis, a prior medical condition that may be related to a person's age, such as degenerative disc disease, can be such a precursor condition, as long as the condition was not compensable, thus requiring overruling of Blais and its progeny. However, we already addressed this issue in our first decision by deciding that Blais was applicable. We will not revisit it now.

We therefore reverse the administrative judge's finding regarding the employee's increase in earning capacity on September 25, 2012, and affirm the balance of the decision. Pursuant to G. L. c. 152, § 13A(6), the insurer is directed to pay the employee's counsel a fee of $1,654.15.

So Ordered.

[8] We noted in Flamino, supra, fn. 1, that reaching may also be a compensable event.

_____
William C. Harpin
Administrative Law Judge

Filed: **October 31, 2017**

_____
Bernard W. Fabricant
Administrative Law Judge

_____
Martin J. Long
Administrative Law Judge