

COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF
INDUSTRIAL ACCIDENTS

BOARD NO. 025033-03

Stephen Wiswell
Massachusetts Institute of Technology
Massachusetts Institute of Technology

Employee
Employer
Self-insurer

REVIEWING BOARD DECISION

(Judges Costigan, Fabricant and Koziol)

The case was heard by Administrative Judge Bean.

APPEARANCES

Alan S. Pierce, Esq., for the employee
Thomas P. O'Reilly, Esq., for the self-insurer at hearing
Paul M. Moretti, Esq., for the self-insurer on appeal

COSTIGAN, J. The self-insurer appeals from an administrative judge's decision awarding the employee § 34A permanent and total incapacity benefits and medical benefits for treatment of his work-related Lyme disease. The self-insurer contends the judge's findings are internally inconsistent, and therefore the decision in its entirety cannot stand. We disagree in part, and summarily affirm the judge's award of § 34A benefits.¹ We agree, however, that the judge made insufficient subsidiary findings of fact to support his conclusion that intravenous (IV) antibiotic treatments are adequate and reasonable under §§ 13 and 30. Therefore, we recommit the case for further findings addressing these issues.

The employee, age fifty-one at the time of the hearing, has an associate's degree in horticulture, and had worked in the horticultural field since 1980. (Dec. 837-838.) Commencing in 1996, the employee worked for the Massachusetts Institute of Technology as caretaker of the Endicott Estate. His job duties included

¹ It was " 'within the province of the [administrative judge] to accept the medical testimony of one expert and to discount that of another.' Fitzgibbons's Case, 374 Mass. 633, 636 (1978)." Coggin v. Massachusetts Parole Bd., 42 Mass. App. Ct. 584, 589 (1997). See footnote 3, infra.

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managing the estate's greenhouses, planting the formal gardens, and maintaining the gardens and grounds. He was in excellent health throughout his tenure at the Endicott Estate, until mid-2003. (Dec. 838.)

On July 14, 2003, the employee worked in a neglected area of the Endicott property. That day, he found a deer tick on his inner thigh. He had done no horticultural work for the past several days except for his employer. (*Id.*) The employee was symptom-free and returned to work, but later tested positive for having contracted Ehrlichiosis² and Lyme disease. The self-insurer's appeal challenges the judge's findings, or lack thereof, relative to the employee's diagnosis which, in turn, affect his findings concerning the nature, extent and causal relationship of the employee's alleged disability, and the compensability of his treatment regimen.

Ruling the medical issues complex, the judge allowed the parties to submit medical evidence in addition to the October 23, 2007 report of Dr. David J. Crowley, the § 11A impartial medical examiner. (Dec. 837). The employee submitted the reports and deposition testimony, (Ex. 6), of Dr. Bernard Raxlen, a psychiatrist and doctor of clinical ecology. (Dec. 841.) The self-insurer submitted the reports and deposition testimony, (Ex. 8), of Dr. Henry M. Feder, Jr., a specialist in pediatrics and infectious disease, (Dec. 844), and of Dr. Nancy A. Hebben, Ph.D., (Ex. 7), a diplomate in clinical neuropsychology. (Dec. 842-844.)

Dr. Raxlen, the employee's treating physician, diagnosed persistent Lyme disease and Ehrlichiosis, and opined the employee had related significant physical and cognitive disability. The doctor recommended continued Rocephin IV antibiotic therapy, which provides the employee some relief from head pressure and pain, some diminution of light and sound sensitivity, and less fatigue. (Dec. 841-842.)

Dr. Feder, the self-insurer's expert physician, opined the continuation of the Rocephin IV antibiotic treatment was contraindicated by the high risks associated with such treatment. He opined the anti-inflammatory benefits of the antibiotic could

² Ehrlichiosis is a bacterial disease transmitted to dogs, cattle, sheep and humans by a tick bite. Dorland's Illustrated Medical Dictionary, 27th ed. (1988).

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be provided by a different regimen of drugs, which would not carry the destructive side effects of the long-term antibiotic use. Dr. Feder further opined the use of IV Rocephin was not appropriate to treat Lyme disease, and he would recommend an orally-administered medication. (Dec. 844-845.)

The judge addressed the four expert medical opinions in evidence:

I find that the employee continues to suffer from the effects of the tick bite that he received at work on July 14, 2003. These effects permanently and totally disable him as defined by section 34A and relevant case law. In making these determinations, I rely on the credible testimony of the employee and his wife. The four doctors (Crowley, Raxlen, Hebben and Feder) offered interesting and varied opinions on the medical issues of this case. Dr. Crowley offered little helpful information beyond the fact that the employee suffered from a psychiatric condition. Dr. Hebben, a Ph.D., provided interesting information, but little that I felt comfortable adopting to decide this case. She believes that the employee gave little effort in the tests that she administered, conceding that perhaps he did so subconsciously, and that he may have feigned memory loss. She offered the opinion that the tick bite did not cause the employee's condition, but his focus on it "cascades into a delusional belief" that he has disabling Lyme disease.

I am left with the opinions of Doctors Raxlen and Feder. In the end I rely on the persuasive opinions of Dr. Raxlen . . . to order the self-insurer to continue to pay to the employee section 34A permanent and total disability compensation. I accept that the employee is totally disabled and that his condition is unlikely to change any time soon. I accept that he has physical problems and the associated pain, cognitive problems and psychiatric problems including suicidal ideation.^[3] And, I relate each of those conditions back to the July 14, 2003 industrial injury.

³ The self-insurer contends "[t]he administrative judge skirts around the issue [of the nature of the employee's disability] without deciding whether the employee suffers from the questionable 'chronic' Lyme Disease or from a psychological disorder that may or may not be associated with the tick bite." (Self-ins. br. 18-19.) This argument ignores the judge's extensive findings based on the opinions of Dr. Raxlen, which he adopted:

Dr. Raxlen has been the employee's treating doctor since November 16, 2004. He is a psychiatrist and a doctor of clinical ecology who has specialized for many years in the treatment of Lyme disease. Deposition, pages 30-38. In his September 12, 2008 report he recorded a history of a tick bite on July 14, 2003 while at work, and the onset of flu like symptoms on July 26, 2003. He noted the myriad of symptoms that the employee has and offered a diagnosis of persistent neuroborreliosis (Lyme disease) and Ehrlichiosis. See also the reports of December 3, 2004, March 21, 2006,

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But I was impressed with Dr. Feder's opinions. In particular, I share his reluctance to continue the employee's IV treatments. I have no medical expertise and can offer no informed opinion on the efficacy of IV treatments. However, Dr. Feder's position that antibiotics provide no relief to chronic Lyme disease patients by addressing bacterial issues, but may provide some incidental relief as antibiotic medications often act as anti-inflammatories has the ring of truth. His opinion suggests to me that the IV treatment of the drug Rocephin should be discontinued and replaced by an anti-inflammatory drug which could provide the relief of an anti-inflammatory without the risks associated with the antibiotic. As a person with no medical expertise, I would suggest that the employee consider trying this change in medicinal regimen. However, I remain cognizant of the employee's credible testimony, backed by the testimony of his wife and Dr. Raxlen, that his current IV treatment is the only treatment so far tried, that provides any significant relief. So, while I can urge the employee to attempt a change in medicinal regimen, I do not have sufficient confidence in Dr. Feder's opinion or in my belief in his opinion, to order a discontinuance of Dr. Raxlen's prescribed IV treatment.

(Dec. 846-847.) The judge therefore found the employee was permanently and totally incapacitated, and awarded him § 34A benefits from and after August 17, 2006. He also found the IV treatment was reasonable and necessary,⁴ and ordered the self-insurer to continue to pay for it. (Dec. 847.)

We agree with the self-insurer that the judge's findings as to the efficacy of the

and December 16, 2008 and the deposition at page 12, line 4. These conditions are chronic and can wax and wane over time. Deposition, page 57, line 10. In several of his reports and in his deposition, he noted findings of significant physical and cognitive disability. Citing the section 34A standard in his March 21, 2006 report, he found the employee to be "permanently disabled due to his work related injury on July 14, 2003." The employee "is incapable of doing any work of any type in the general labor market." Deposition, page 24, line 15. His incapacity is permanent. Deposition, page 24, line 24. The disability is causally related to the tick bite of July 14, 2003. Deposition, page 25, line 17.

(Dec. 841.)


⁴ Section 30 of c. 152 requires an insurer to "furnish to an injured employee *adequate and reasonable health care services*, and medicines if needed, together with the expenses necessarily incidental to such services." The statute further provides: "Where services are provided to employees under this section, *the reasonable and necessary costs* of such services shall be paid by the insurer. (Emphases added.)

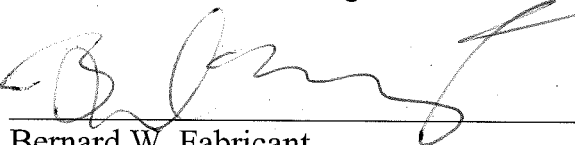
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IV antibiotic treatment are internally inconsistent. The judge cannot properly conclude the opinion of Dr. Feder -- that IV antibiotics provide no relief to chronic Lyme disease sufferers -- "has the ring of truth," and then dismiss it in favor of Dr. Raxlen's implicit opinion that IV antibiotic treatments are adequate and reasonable to provide the employee relief from Lyme disease symptoms. Equivocal musings are no substitute for definitive findings. The judge simply did not resolve the issue in controversy. Moreover, the judge's finding that he does "not have sufficient confidence in Dr. Feder's opinion . . . to order a discontinuance of Dr. Raxlen's prescribed IV treatment," (Dec. 847), may constitute an improper shifting of the burden of proof to the insurer to defeat the employee's entitlement to benefits under §§ 13 and 30.

Accordingly, we vacate the judge's order of benefits under §§ 13 and 30, and recommit the case for further findings of fact on that issue. As the employee has prevailed against the self-insurer's appeal of the award of § 34A benefits, pursuant to § 13A(6), we order the self-insurer to pay employee's counsel a legal fee in the amount of \$1,497.28.

So ordered.


Patricia A. Costigan
Administrative Law Judge


Bernard W. Fabricant
Administrative Law Judge


Catherine Watson Koziol
Administrative Law Judge

Filed:

