26 Mass. Workers' Comp. Rep. 125 (Mass.Dept.Ind.Acc.), 2012 WL 2373032

Department of Industrial Accidents

Commonwealth of Massachusetts

GEORGE SNYDER, EMPLOYEE
GLOBE NEWSPAPER COMPANY, EMPLOYER
THE NEW YORK TIMES COMPANY, SELF-INSURER

Board Nos. 031080-09, 037140-09
Filed: June 12, 2012

Appearances
****1** Brian C. Cloherty, Esq., for the Employee at Hearing and on Brief
William A. Hanlon, Esq., for the Employee on Brief
W. Todd Huston, Esq., for the Self-Insurer

REVIEWING BOARD DECISION

The case was heard by Administrative Judge Bean.

COSTIGAN, J. ***126** The self-insurer appeals from a decision awarding the employee ongoing § 34 total incapacity benefits. Its primary argument is that the employee failed to prove, and the judge failed to determine with requisite certainty, a specific date of injury. We affirm the decision.

The employee, who was fifty-three years old at hearing, [1] had worked for the employer off and on since he was fifteen. In 1992, he began full-time employment as a mailer, a job requiring constant bending. In 1999, he fell at work and injured his back. As a result, he underwent two surgeries and missed seventeen months of work. He returned to unrestricted work but was never 100%. (Dec. 662.)

"In the second half of November 2009," the employee suffered another industrial injury when, "while turning a pallet pal machine," [2] he experienced pain in his right leg. (Dec. 662.) On December 8, ***127** 2009, he returned to the workplace to fill out an incident report with the help of his assistant foreman, Tim Betts, who identified the date of injury as November 24, 2009. [3] The employee used this date in filing his workers' compensation claim. It was not until months later that he learned the date of injury cited on the incident report and in his claim was subsequent to his first date of medical treatment, November 23, 2009. (Dec. 663.)

On the first day of hearing, the self-insurer moved to dismiss the employee's claim, alleging there was no evidence that his injury occurred on November 24, 2009. (Tr. I, 3-4.) The judge, however, allowed the employee to add a new claim alleging November 19, 2009, as the date of injury, and a second board number — 037140-09 — was created. (Dec. 661-662.) After the joinder of the new date of injury, the judge offered the self-insurer additional time to prepare its defense, but the self-insurer declined and the hearing proceeded as scheduled. (Tr. I, 5-6.)

Although he admitted to some difficulty recalling all the dates attendant to his injury, (Tr. II, 53), the employee testified that it occurred on November 19, 2009. (Tr. I, 28; Tr. II, 12, 54.) Doctor Victor A. Conforti, the § 11A impartial examiner, stated in his report and testified at deposition that the employee told him he was hurt at work on November 19, 2009, not November 24th. (Ex. 3, 1; Dep. 11, 18, 31.) [4]

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The judge found that the employee had "abandoned" his original claimed date of injury of November 24, 2009, in favor of the November 19, 2009 date of injury. (Dec. 662.) He wrote, however: "I am still uncertain that the November 19, 2009 date is the correct one, although I find that the incident occurred and that it occurred prior to the first date of treatment." (Dec. 663.) In explaining his uncertainty, the judge stated that when the employee was first seen for treatment on November 23, 2009, the history in the medical report reflected his pain had begun six days earlier, which would have been on November 17th. A second report of November 27th described pain for ten days, or since November 17th. Id.

****2** ***128** Nonetheless, relying on "the credible testimony of the employee [5] and the persuasive medical opinions of the impartial medical examiner," [6] (Dec. 665), the judge found the employee suffered an industrial injury "*on or about* November 19, 2009." Id. (Emphasis added.) Although Dr. Conforti opined the employee was permanently partially disabled, upon consideration of the employee's age, his education at a vocational high school, long history of heavy work, level of pain, and the recommendation of surgery, the judge found the employee was totally incapacitated. He ordered the self-insurer to pay § 34 total incapacity benefits from and after December 15, 2009, the date on which the employee claimed his incapacity began. (Dec. 665-666.)

The self-insurer makes two related arguments which center around its contention that the judge committed reversible error by not pinpointing the date of injury. First, it claims the employee failed to meet his burden of proof because the evidence does not support the occurrence of an industrial accident on November 19, 2009. Second, the self-insurer asserts the judge failed to address all the issues in controversy because he did not find a specific date of injury. Both arguments are based, in part, on the judge's stated uncertainty regarding the date of injury.

We address the burden of proof argument first. The employee's burden of proof encompasses two subsidiary burdens: first, a burden of production — he must produce enough probative evidence on which a judge may base an award; and second, a burden of persuasion — he must persuade the administrative judge, as fact finder, to enter ***129** an award in his favor. See Nason, Koziol & Wall, Workers' Compensation § 17.2 (3rd ed. 2003). The self-insurer's contention that there was no evidence of a November 19, 2009, date of injury speaks to the employee's burden of production. This argument is without merit.

As noted supra and infra, there was ample testimony from the employee that November 19, 2009, was the date of his injury, and from Dr. Conforti that the employee told him the injury occurred on that date. The judge credited that testimony. While there may have been evidence [7] suggesting a different date of injury, it is fundamental that conflicts in the evidence requiring credibility assessments are for the judge to resolve. Orlofski v. Town of Wales, 23 Mass. Workers' Comp. Rep. 175, 182 (2009). As long as the judge's findings are grounded in the evidence and reasonable inferences drawn therefrom, as they are here, we will not disturb them. Blais v. Gallo Constr., 25 Mass. Workers' Comp. Rep. ___ (2011); Ormonde v. Choice One Communications, 24 Mass. Workers' Comp. Rep. 149, 153 (2010). [8] ***130** Accordingly, we reject the self-insurer's argument that the employee failed to meet his burden of production.

****3** The self-insurer's related argument — that the judge erred by not addressing all the issues in controversy, as required by § 11B, i.e., not finding a specific date of injury — also fails. The self-insurer argues that the judge's acknowledged uncertainty about the date of injury, and his failure to state in "unassailable language," (Self-ins. br. 7), that the employee was injured on November 19, 2009, render his factual findings inadequate. It further maintains the judge's finding that the injury happened "on or about November 19, 2009," fails to "state with certainty" the date of the employee's injury. (Self-ins. br. 7.)

To the extent this argument is based on the judge's expression of some doubt as to the precise date of injury, it is essentially a challenge to the employee's burden of persuasion. However, the self-insurer's argument presupposes a standard of proof greater than that applicable in workers' compensation cases. "It is axiomatic that the employee must prove his case by a *preponderance of the evidence, i.e., that more likely than not*, he has established all elements necessary to his

claim for workers' compensation benefits." Fucillo v. M.I.T., 23 Mass. Workers' Comp. Rep. 355, 356 (2009)(emphasis added), citing Patterson v. Liberty Mut. Ins. Co., 48 Mass. App. Ct. 586, 592 (2000); Sponatski's Case, 220 Mass. 526, 528 (1915). The employee need not prove each element with "unassailable" certainty or, as in criminal cases, beyond a reasonable doubt. He need only present evidence sufficient to persuade the fact finder that it is more likely than not the injury occurred on November 19, 2009. Thus, the judge need not be absolutely certain the injury occurred on that date; he simply must be persuaded by the evidence that it is more likely than not that November 19th was the correct date. The judge's findings, based on the adopted evidence, reflect that he was so persuaded.

As to the self-insurer's argument that the judge failed to find the date of injury with sufficient specificity, we note that the phrase, "on or about," has often been used by administrative judges as well as the reviewing board with reference to injury dates. See, e.g., Pimental v. MCI Cedar Junction, 25 Mass. Workers' Comp. Rep. ___ (2011)(administrative judge found injury occurred "on or about August 12, 2004"); Lesoine v. Corcoran Mgt. Co., Inc., 22 Mass. Workers' Comp. Rep. 153, 155 (reviewing board recited employee injured back ***131** "on or about" October 22, 2003). However, the self-insurer has not cited, nor have we found, any case holding a judge's findings inadequate due to the use of that phrase. Certainly, we have found no cases supporting the self-insurer's argument that "on or about" is too indefinite to satisfy the judge's duty to make specific findings on all issues.

Even if the judge's finding that the injury occurred "on or about[9] November 19" is construed as an approximation, rather than a precise finding, of the date of injury, we think that in this case, it is sufficiently specific to allow us to determine with reasonable certainty that he applied the law correctly. See Praetz v. Factory Mut. Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 46-47 (1993), citing G. L. c. 152, § 11B. Based on the judge's initial statement that the employee was injured in the second half of November 2009, (Dec. 662), and "prior to the first date of treatment," (Dec. 663), which was November 23, 2009, id., there was, at most, a one week period in question. The self-insurer has not shown how a different date of injury during that week would affect the employee's case in any way, other than to cast doubt on his credibility, which the judge has already accepted.[10]

****4** We briefly address the other issues raised by the self-insurer. Regarding the self-insurer's contention that there is no basis in the ***132** evidence for the selection of December 15, 2009, as the date for commencing benefits, we point out that is the first date from which the employee, for whatever reason, claimed benefits; therefore, the judge could not have awarded benefits prior to that date. Doucette v. TAD Tech. Inst., 22 Mass. Workers' Comp. Rep. 99, 107 (2008)(error for judge to award benefits not claimed). The self-insurer also argues that the decision must be reversed because the judge made inconsistent findings by stating that the employee worked several days after the injury, (Dec. 661), and then that he left on the date of injury, not to return until December 8, 2009. (Dec. 663.) Given the judge's award of benefits effective December 15, 2009, whether the employee worked subsequent to November 19, 2009, is irrelevant. Thus, even if the judge's findings are inconsistent, such is harmless error.

Next, the self-insurer maintains that because the judge stated the medical reports of the employee's treating physician, dated November 23, 2009, and November 27, 2009, were not in evidence, (Dec. 663), he erred by not considering them. The judge's decision, however, clearly reflects he considered those reports in the context of determining the appropriate date of injury, referencing also the employee's testimony and the date the employee first sought treatment. (Id.) We are satisfied the judge considered those reports to the extent permissible.[11] As noted supra, see footnote 4, the judge did not find Dr. Conforti's report inadequate or the medical issues complex; thus, the doctor's report and deposition testimony constituted prima facie evidence regarding medical issues.

Lastly, the self-insurer challenges the judge's statement that a December 4, 2009, report by Dr. Wilson contains an accurate history of the industrial injury. (Dec. 663.) It contends Dr. Wilson stated the employee was injured "lifting and turning a heavy object," rather than turning a pallet pal, as the judge found. Again, the judge adopted Dr. Conforti's

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testimony, which did contain the same history found by the judge, and he did not specifically adopt Dr. Wilson's report on that issue.

Accordingly, we affirm the decision. Pursuant to § 13A(6), we order the self-insurer to pay employee's counsel a fee in the amount of $1,517.62.

So ordered.

Patricia A. Costigan
Administrative Law Judge
Mark D. Horan
Administrative Law Judge
Catherine Watson Koziol
Administrative Law Judge

Footnotes

1 There were two days of hearing. References herein to the transcript of the January 13, 2011, hearing are designated, "Tr. I," and to the transcript of the February 24, 2011, hearing, "Tr. II."

2 "Pallet pals raise and lower pallets of newspapers or inserts so as to minimize the reaching and bending employees need to do to perform their mailing jobs." (Dec. 662.)

3 The employee testified that he signed the incident report, but that all information above his signature was filled in by Mr. Betts. (Tr. I, 26-27.)

4 Doctor Conforti's testimony had prima facie status as to medical issues. Although the judge made no ruling at hearing, and gave no indication in his decision, as to whether he found the report adequate or the medical issues complex, the self-insurer's brief states the judge denied its motion to open the medical evidence. (Self-ins. br. 5.) The employee's brief corroborates this statement. (Employee br. 14.)

5 With respect to his medical condition, the employee testified he experiences low back pain and numbness radiating down his leg to his toes. Cortisone injections in 2010 provided only temporary relief, and he takes narcotic pain medication. Surgery has been recommended, but has not occurred. (Dec. 663.)

6 Doctor Conforti reported a history of a prior work-related back injury:
Eleven years prior to the injury of 11/19/09, [the employee] injured his back at work while working for the Boston Globe and had surgery for a herniated disk. He had no improvement and had a 2nd surgery about 6 months later. All together [sic] he was out of work for about 1 year and and returned to work in the mailroom. Specifically, he denied any problems whatsoever with his back, denied any treatment, and denied any lost work time for his back in the year prior to the injury of 11/19/09.
(Ex. 3.) Doctor Conforti diagnosed the employee as being "status post excision of the L5-S1 disc with a recurrent herniation at the same level on the right with radiculitis and 'localizing signs, S1 nerve root, right.' ... He causally related the diagnosis to the November, 2009 industrial injury," and opined that without surgery, the employee was restricted from "'any type of lifting, bending, stooping, climbing or kneeling.'" (Dec. 664, quoting from Ex. 3, [Conforti report and deposition].)

7 Although the medical reports of November 23, 2009, and November 27, 2009, could be read to support a November 17, 2009 date of injury, the employee's testimony suggested his reports to the doctors of how long his pain had lasted were merely approximate. The employee testified that he told his doctors on November 23rd that his pain had started "roughly" six days ago, "[g]ive or take." (Tr. II, 41.) On November 27th, he reported his pain had been present for "about ten days." (Tr. II, 44, citing November 27, 2009, report of Dr. Bowman contained in Ex. 8, [Social Security file]). Based on this testimony, it was not unreasonable for the judge to infer that the injury occurred on November 19, 2009. See Borawski v. Gencor Indus., Inc., 17 Mass. Workers' Comp. Rep. 542, 546 (2003)(credibility findings must be based in the record evidence or reasonable inferences drawn therefrom and pertinent to the claim).

8 Moreover, the fact that the employee initially filed his claim with the November 24, 2009, date of injury did not require the judge to reject the employee's later claim with the corrected date of November 19, 2009. General Laws c. 152, § 44, contemplates that a claim may be filed with an inaccurate date of injury, which does not invalidate the employee's notice to the employer, unless it is shown the employee intended to and did, in fact, mislead the insurer:

Such notice [of injury] shall not be held invalid or insufficient by reason of any inaccuracy in stating the *time*, place or cause of the injury unless it is shown that it was the intention to mislead and that the insurer was in fact misled thereby, Want of notice shall not bar proceedings, if it be shown that the insurer, insured or agent had knowledge of the injury, or if it is found that the insurer was not prejudiced by want of notice.

General Laws c. 152, § 44, emphasis added. The self-insurer did not raise § 44 as a defense at hearing, nor did it allege it was misled or prejudiced by the change in date from November 24th to November 19th. See Cunha v. MCI Bridgewater, 23 Mass. Workers' Comp. Rep. 331, 334-335 (2009)(insurer's argument that employee "made up" date of injury was not raised below and thus waived). In fact, after the November 19, 2009, date of injury was added, the self-insurer declined the judge's offer of more time to prepare its defense. (Tr. I, 5-6.)

9 Black's Law Dictionary defines "on or about" as:

A phrase used in reciting the date of an occurrence or conveyance, or the location of it to escape the necessity of being bound by the statement of an exact date, or place; approximately; about; without substantial variance from; near. For purpose of pleading, term "on or about," with respect to specified date, means generally in time around date specified. [Citations omitted].

10 McCaffrey v. Texas Instruments, 2 Mass. Workers' Comp. Rep. 193 (1988), cited by the self-insurer in support of its argument that the judge failed to find the date of injury with sufficient specificity, is inapposite. In McCaffrey, the judge made "*no finding* with respect to the date of such injury." Id. at 193(emphasis added). He recited the employee's testimony that in February 1986 she had difficulty with her arms, prompting her to seek medical attention, but that she continued to work until April 1987. The reviewing board noted that,

the date of injury is important because it fixes the maximum temporary total and partial incapacity entitlement and establishes the responsible insurer. If the administrative judge finds the injury occurred in February 1986 and disability started in April 1987, then serious questions of causal relationship between the injury and disability surface and must be addressed.

Id. at 194. As noted *infra*, those questions are not present here.

11 The parties admitted the employee's entire Social Security file, consisting of approximately 340 pages of material. (Ex. 8; Tr. II, 3-6.) The questioning that followed centered primarily around pinpointing the exact date of injury. (Tr. II, 9-17, 29-53, 81-82.)

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