2019 WL 5212376 (Mass.Dept.Ind.Acc.)

Department of Industrial Accidents

Commonwealth of Massachusetts

DOUGLAS BELL, EMPLOYEE
ELECTRONIC DATA SYSTEMS, EMPLOYER
ACE PROPERTY AND CASUALTY INSURANCE COMPANY, INSURER

Board No. 035340-08
Filed: September 23, 2019

Appearances
***1** Bernard J. Mulholland, Esq., for the Employee
W. **Todd Huston**, Esq., for the Insurer

REVIEWING BOARD DECISION

This case was heard by Administrative Judge Herlihy.

LONG, J. The insurer appeals from a decision ordering it to pay § 34A permanent and total incapacity benefits and reasonable and necessary medical expenses including but not limited to reimbursement and continued prescriptions for Topamax and ibuprofen. (Dec. 10.) The insurer claims the administrative judge failed to perform the analysis required under M.G.L. c. 152, § 1(7A), and that her subsidiary findings mischaracterized evidence relative to the employee's obesity. The insurer also alleges the administrative judge's reliance upon the impartial examiner's opinion was reversible error. Although the insurer's mischaracterization argument has technical merit, the insurer failed to fulfill its obligation to produce an appropriate offer of proof to satisfy its burden of production pursuant to § 1(7A). Therefore, any error resulting from the mischaracterization is rendered harmless. Finding no merit in the insurer's argument that the judge's reliance upon the impartial examiner's opinion was reversible error, we affirm the decision.

The employee was fifty-four years old at the time of hearing. He completed some college courses but never earned a degree. The employee primarily worked in the computer industry. Throughout his career, he learned about computers through the "hands on" experience of selling them. (Dec. 4-5.)

On August 8, 2008, the employee was attending a company cookout when he slipped, with his left foot falling underneath him. He experienced pain in his left knee and reported the fall to his manager. The employee continued to work by wearing a brace and working remotely from home until ankle surgery in December of 2008. The employer ceased the remote working arrangement in October 2009 because the employee was not keeping up. Since the industrial accident, the employee has had multiple left ankle and knee surgeries. (Dec. 4-5.)

The insurer accepted liability for the employee's left knee and ankle injuries but denied payment of prescriptions for ibuprofen and Topamax. The employee filed a claim seeking payment for those medications pursuant to §§ 13 and 30, and at the § 10A conference held on December 8, 2016, also filed a motion to join a claim for § 34A, permanent and total incapacity benefits. A conference order for payment of the claimed prescriptions was issued but no action was taken on the motion to join the § 34A claim. The insurer filed a timely appeal, prompting an impartial examination by Dr. Jerald Katz, on April 24, 2017.

At the § 11 hearing held on August 22, 2017, and November 14, 2017,[1] the judge found the medical issues to be complex and allowed the introduction of additional medical evidence to supplement the impartial medical opinion of Dr. Katz. The judge also formally allowed the employee's motion to join the claim for § 34A benefits that had been filed at the conference on December 8, 2016. The insurer argued it would be unfairly prejudiced in defending a § 34A claim because the only issue in dispute at the conference was the reimbursement of costs for medication. The judge disagreed, finding:

***2** On December 8, 2016, employee counsel filed a claim for § 34A benefits and at hearing moved to join the employee's claim for § 34A. The insurer argued it would be unfairly prejudiced in defending a 34A claim whereas its appeal was based on the reimbursement of medication. I disagree. I find the insurer and counsel were aware of the pending 34A claim in advance of the hearing date(s), had ample time for its own medical examination and the benefit of deposing the impartial medical examiner. (Tr. I at 10,11.) I allowed the employee's claim based on judicial economy and opened the medical record.

(Dec. 3.)

As to defenses, the insurer disputed disability and extent thereof and denied the employee's entitlement to §§ 13 and 30 benefits relative to the claimed prescriptions. Following the employee's direct testimony on August 22, 2017, the insurer raised § 1(7A)[2] for the first time as an additional defense, citing to the employee's apparent obesity and testimony that he weighed three hundred pounds on the date of injury as support for the defense.[3] The judge allowed the insurer's request to raise the § 1(7A) defense.

In her hearing decision, the judge found the employee to be permanently and totally incapacitated pursuant to § 34A as of August 2, 2017, and ordered the payment of the claimed prescriptions. The judge relied upon the medical opinions of Dr. Jerold Katz, Dr. James McGlowan, Dr. Anil Soni, and Dr. Dana Zalkind, in support of the decision, noting that, "[i]nsurer counsel never properly raised § 1(7A) but did raise the issue during Dr. Katz's deposition." (Dec. 9, n. 6.) Despite finding that § 1(7A) was "never properly raised," the judge also found, "Dr. Katz opined the employee was obese at the time of the injury but not on the date of his examination. (Katz depo. at 14.)" (Dec. 7.) The judge continued:

Insurer counsel argues obesity is a preexisting condition. Dr. Katz opined obesity is a disease. Obesity is not compensable. I adopt the opinion of Dr. Katz and find there is no correlation between success of a total knee replacement and morbid obesity. Indeed, I have adopted the opinion of Dr. McGlowan and find the industrial accident of August 6, 2008 remains the major cause of any and all permanent and total disability.

(Dec. 9.)

The insurer alleges the judge failed to perform the analysis required under § 1(7A) since the employee has the burden of proof on a properly raised ""major cause" defense under G.L. c. 152, § 1(7A). (Insurer br. 8.) However, while the judge allowed the insurer to raise the defense, the insurer did not comply with the provisions of 452 Code Mass. Regs. § 1.11(1)(d) and its mandated offer of proof to satisfy its burden of production. The text of 452 Code Mass. Regs. § 1.11(1)(d) states:

In any hearing in which the insurer raises the applicability of the fourth sentence provisions of M.G.L. c. 152, § 1(7A), governing combination injuries, the insurer must state the grounds for raising such defense on the record or in writing, with an appropriate offer of proof.

***3** As the court in MacDonald's Case, 73 Mass. App. Ct. 657, 659-660 (2009), explained, an insurer wishing to rely on § 1(7A)'s heightened "a major cause" standard, must first meet a burden of production, which includes producing evidence of a noncompensable pre-existing condition that combines with the industrial injury.

The judge did not adopt any medical opinion that the employee's morbid obesity *combined* with the compensable injury to cause or prolong disability or a need for treatment. The extent of the insurer's offer of proof appears to be counsel stating, "I believe he would be obese, which is a medical condition," (Tr. I, 66), and Dr. Katz' testimony that, at the time of his examination, "[h]e was still morbidly obese." (Dep. 14-15.) These statements fall well short of the insurer's obligation to provide "an appropriate offer of proof" and fail to satisfy its burden of production. We observe that the report of Dr. Jerome Siegel, dated March 18, 2014, contains the following statement:

Although Mr. Bell continues to note some minor tenderness in his left ankle, his obesity most likely contributes to his ankle discomfort. I do not see information in his medical records that Mr. Bell's weight or obesity has been addressed by his physicians as a contributing mechanical factor to his ongoing orthopedic problems.

(Insurer Ex. 3.) However, while Dr. Siegel indicates that the employee's obesity "contributes to his ankle discomfort," the statement lacks any reference to causing or prolonging disability or the employee's need for treatment and does not comment on the effects, if any, on the employee's injured left knee. In addition, to the extent Dr. Siegel's opinion could have served to satisfy the insurer's burden of production, the judge clearly rejected it by not adopting any portion of his opinion. Thus, further consideration of the § 1(7A) defense was rendered moot by the rejection of Dr. Siegel's opinion. See Dellarusso v. Mass. Gen. Hosp., 25 Mass. Workers' Comp. Rep. 415, 418 (2011).

Moreover, during the deposition of Dr. Katz, the insurer did not pose questions regarding whether or not the employee's obesity combined with the compensable injury to cause or prolong disability or the need for treatment.[4] In Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79, 82 (2000), where the employee's obesity was also the alleged pre-existing condition[5] under § 1(7A) we stated:
The insurer had the opportunity, at the deposition of the impartial physician, to cross-examine the doctor as to the § 1(7A) predicates that it apparently took to be self-proving. The insurer might have been well-advised to endeavor to make such an inquiry, as it had the burden of producing evidence of the predicates to § 1(7A)'s application - the existence of a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, that combines with the compensable injury or disease that is the subject of the claim or complaint.

***4** Since the insurer failed to meet its burden of production, the heightened causation standard of § 1(7A) does not apply. See Mac Donald's Case, supra at 660, citing Johnson v. Center for Human Dev., 20 Mass. Workers' Comp. Rep. 351, 354 (2006).[6] The insurer's appeal on this issue thus fails.

The insurer also claims the judge mischaracterized Dr. Katz' deposition testimony when she found "Dr. Katz opined the employee was obese at the time of the injury but not on the date of his examination," (Dec. 7), and this constitutes reversible error. The employee acknowledges the judge's finding is a mischaracterization of the doctor's deposition testimony, since Dr. Katz actually testified that the employee was morbidly obese at the time of the impartial examination. (Employee br. at 4; Dep. 15.) However, with the insurer's failure to submit an appropriate offer of proof to meet its burden of production for its § 1(7A) defense, any error from this mischaracterization is harmless.

The insurer further alleges the impartial physician impermissibly delegated or deferred his medical determinations to another physician. (Insurer br. 12.) Upon review of the impartial physician's report and deposition testimony we disagree with the insurer's argument. Dr. Katz' April 24, 2017, impartial report unequivocally states, "[i]t is my opinion that the treatment to date, including his medical treatment at the Pain Center which includes the Topamax, is reasonable and necessary and causally related to the work related injury that occurred on 8/6/2008." (Ex. 4.) Dr. Katz' final opinions regarding the prescription issue were expressed during his deposition as follows:
Q. And how about to the treatment he's received so far, including medications he's been prescribed —well, we'll start with that.

A. I'm not a pain specialist per se, so I don't want to necessarily comment on his Topamax appropriate [sic]. But his pain specialist certainly felt it was, and his need for being on Topamax is due to the pain he's having which is related to his work-related injury.

(Dep. 16.)
Q. And, Doctor, as of the date that you examined Mr. Bell and based, again, upon your history you took, the medical records you reviewed, including the ones that you've reviewed today, do you have an opinion based upon a reasonable degree of medical certainty as to whether or not the industrial accident of May 6th, 2008 remains a major cause of his ongoing diagnosis, his ongoing disability and restrictions that you've noted and his ongoing need for medical treatment?

A. Yes.

Q. And would that opinion be?

A. Exactly that, that his work-related injury of August 6th, 2008 is the primary cause of his ongoing disability, need for past, present and future treatment for this.

(Dep. 28-29.)

We see no error in the judge utilizing Dr. Katz' opinion to support the order of payment for the claimed prescriptions, nor do we detect any mischaracterization of Dr. Katz' expert medical opinion by the judge in this case.

***5** The insurer's final argument on appeal alleges it was error for the judge to rely on the impartial opinion because it "was unduly prejudiced by the impartial examiner's impermissible expansion of the issue presented. Disability was not at issue when the impartial examiner examined Mr. Bell; the impartial examiner impermissibly expanded the issues in dispute. Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399, 402 (1997)." (Insurer br. 13-14.) While the insurer correctly observes the issue in dispute at the time of the impartial examination was whether the requested prescriptions were ""reasonable and necessary," Dr. Katz did adequately address this very issue in both his report and deposition testimony. See discussion supra. The insurer's citation to Ruiz is misplaced because there the impartial physician expanded the scope of the dispute when he found no medical disability whatsoever, despite the parties' agreement on all issues except whether the employee's disability was partial or total. Ruiz, supra at 402. Here, Dr. Katz addressed the prescription issue as requested, and his opinion played no role in the joinder of the additional § 34A claim upon which the insurer's allegation of prejudice is based.

A review of the record and the hearing decision reveals the insurer was aware of the employee's § 34A claim at the time of the § 10A conference on December 8, 2016, and that the judge entertained its prejudice argument at the time of the hearing and found none. (Dec. 3.) To avoid any potential prejudice to the insurer, the judge allowed both parties to submit additional medical records and to depose the impartial physician, which the insurer did. The insurer submitted reports authored by its retained experts, Dr. John Siliski (October 24, 2017) and Dr. James Nairus (December 12, 2016), (Insurer Exs. 1 and 2), both of which address the very issues the insurer claims it was foreclosed from exploring. The insurer also introduced live testimony from an expert vocational witness, (Tr. II, 54-79), together with her written report, (Ex. 7). The judge further insulated the insurer from any concerns of prejudice by inviting insurer's counsel to defer his cross-examination of the employee until a later date if, after the employee's direct examination, counsel still believed prejudice existed. (Tr. I, 15.) Counsel did not make any such additional claim of prejudice and did not accept the judge's invitation to defer the cross-examination of the employee. "'It is well settled that an administrative judge has broad discretion in setting procedure for matters assigned to her docket.'" Godinez v. Perkins Paper Co., Inc., 22 Mass. Workers' Comp. Rep. 83, 87 (2008), citing Weikunat, Jr. v. Springfield Muffler Co., 17 Mass. Workers' Comp. Rep. 252, 256 (2003).

"'By [discretion of the court] is implied absence of arbitrary determination, capricious disposition, or whimsical thinking.'" Saez [v. Raytheon Corp. 7 Mass. Workers' Comp. Rep. 20, 22 (1993)], quoting Davis v. Boston Elevated Railway, 235 Mass. 482, 496-497 (1920). ... However, the joinder of claims for disposition in one proceeding is encouraged, see Eaton v. Blue Cross/Blue Shield, 10 Mass. Workers' Comp. Rep. 650, 651 (1996) ....

***6** Mulkern v. Mass. Turnpike Authority, 20 Mass. Workers' Comp. Rep. 187, 192 (2006). Here, the administrative judge went above and beyond what was required in order to negate any potential prejudice to the insurer in defending the § 34A claim at hearing and appropriately cited judicial economy as a factor in allowing the joinder of the § 34A claim. The allegations of prejudice and expansion of the dispute by the impartial examiner are not supported by the record or admitted evidence.

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

So ordered.

Martin J. Long
Administrative Law Judge
Bernard W. Fabricant
Administrative Law Judge
Carol Calliotte
Administrative Law Judge

Footnotes

1 The transcript for the first day of hearing, August 22, 2017, is hereinafter referred to as "Tr. I," and the transcript for the second day of hearing, November 14, 2017, is hereinafter referred to as "Tr. II." and the transcript for the second day of hearing, November 14, 2017, is hereinafter referred to as "Tr. II."

2 General Laws c. 152, § 1(7A), provides, in pertinent part:

If a compensable injury or disease combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

3 Insurer's counsel stated:

The only other issue I do have, your Honor, I had originally thought of raising 1(7A) and then decided not to raise 1(7A); but the employee just testified that he weighed 300 pounds, so I believe he would be obese, which is a medical condition. And I would like to raise that as a defense in this case.

(Tr. I, 65-66.)

4 The general "obesity" questions posed by insurer counsel at Dr. Katz' deposition consisted of three questions regarding obesity in general and did not specifically address the employee's alleged obesity:

Q. Right. And so I understand you though, if you are extremely heavy or morbidly obese, would that not affect the joint space? (Dep. at 34.)

...

Q. And after a total knee replacement, is there any correlation between that and the success of a total knee replacement and morbid obesity? (Dep. at 40.)

...

Q. I assume then there's no prohibition against doing total knee replacements in morbidly obese people? (Dep. at 41.)

Dr. Katz' responses to the general questions listed above likewise spoke to generalities and were non-specific to the employee's medical presentation.

5 The insurer maintains that the judge's adoption of Dr. Katz' statement that obesity is a disease satisfies the non-compensable pre-existing condition predicate of § 1(7A). Dr. Katz did opine that obesity is "a medical condition, and it contributes to other medical conditions," (Katz Dep. 13), and that "he would define it as a disease state." Id. at 14. Because the employee's brief focuses on the insurer's failure to show combination, we make no determination whether Dr. Katz' opinion would support a finding that the employee's morbid obesity was a noncompensable pre-existing disease.

6 Even if § 1(7A)'s "a major cause" standard had applied, the judge's adoption of Dr. McGlowan's opinion that the industrial accident remained "the major cause" of the employee's disability and need for treatment, as well as Dr. Katz's opinion that the work injury was the "primary cause" of his ongoing disability and need for treatment, would have satisfied the employee's burden of proof. See Margraf v. Central Berkshire Regional School Dist., 30 Mass. Workers' Comp. Rep. 7, 11 (2016)(regardless of insurer's burden of production, impartial physician's "resounding" opinion that the work injury remains a major cause of the employee's disability and need for treatment, rendered moot the need for a further analysis pursuant to Vieira v. D'Agostino Assocs., 19 Mass. Workers' Comp. Rep. 50, 53 [2005]).

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