COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.** 017412-03

Albert Swallow	Employee
Environmental Fire Protection, Inc.	Employer
Granite State Insurance	Insurer

REVIEWING BOARD DECISION

(Judges Fabricant, Carroll and Costigan)

APPEARANCES

Michael J. Reno, Esq., for the employee
Mark A. Sullivan, Esq., for the insurer at hearing
Linda A. Borer, Esq., for the insurer on appeal

FABRICANT, J. The employee appeals from an administrative judge's decision awarding a closed period of weekly § 34 temporary total incapacity benefits. The employee claims error in the judge's adoption of the impartial physician's opinion. Finding none, we affirm the decision.

Albert Swallow, a thirty-nine year-old working foreman and pipe fitter, slipped on an aerial lift, and caught himself with his arms, injuring both shoulders, his neck and low back. He has been out of work since the day after the May 8, 2003 accident. (Dec. 3.)

Following a § 10A conference, the administrative judge awarded the employee a closed period of § 35 benefits. Both parties appealed to a de novo hearing. (Dec. 1-2.) Pursuant to § 11A, Dr. W. Lloyd Barnard examined the employee on December 23, 2003, and opined in his January 9, 2004 report that the work accident caused injuries to the employee's shoulders and neck which had totally resolved by the time of his examination. (Dec. 4.)

Subsequent to the impartial examination, the employee had bilateral shoulder surgery. Finding the medical issues complex, the judge authorized the submission of additional medical testimony to address causal relationship and the necessity of the surgery. [1] (Dec.

[1] Compare Escalante v. Reidy Heating and Cooling, 17 Mass. Workers' Comp. Rep. 231 (2003), where we held that surgery occurring after the impartial examination can render

2, 4.) Both parties submitted additional medical evidence. (Dec. 2.) In addition, Dr. Barnard was deposed. After reviewing the records of the employee's surgery, Dr. Barnard reiterated his opinion that his examination of the employee was completely normal, and that he was not a surgical candidate. (Dec. 4; Dep. 14.)

The judge found the employee's testimony credible with respect to his symptomatology only up to the date of the impartial examination, December 23, 2003. He adopted Dr. Barnard's opinion that the employee's shoulder and neck injuries had resolved by that time. (Dec. 6.) The judge further adopted the opinion of Dr. Jerome Siegel that the employee's low back strain had resolved prior to his examination on October 15, 2003. (Dec. 5, 6.) Accordingly, the judge awarded the employee § 34 benefits from May 8, 2003 until December 23, 2003. (Dec. 7.)

On appeal, the employee makes three arguments assigning error to the judge's adoption of the impartial examiner's opinion. First, he contends that Dr. Barnard's opinion was based on facts not found by the judge. Specifically, the employee asserts that, in his deposition, Dr. Barnard suggested that the employee sustained an injury or aggravation subsequent to the impartial examination. (Employee br. 4.) This argument mischaracterizes Dr. Barnard's deposition testimony. When asked to compare his findings of no disability at the time of the impartial examination with those of the employee's treating physician a little over a month later that there were objective and subjective problems with the employee's shoulders, Dr. Barnard stated:

> We both do the same exam, how could that be? Well, that's a very good question, and the answer is - well, one possibility is that he may be a cleverer examiner than I am, okay. Another possibility is maybe that's not true. It could be that he had no pain when I saw him, but suddenly developed pain when he was seen at MGH. It's a mystery of life. Exams change, shoulder exams change, I've never quite understood it, but they do. There we are. We are not dealing with machines, we are dealing with people.

(Dep. 13-14.) When asked if there was anything in the medical records regarding the surgery that would cause him to revisit his opinion, Dr. Barnard stated:

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the § 11A physician's opinion *inadequate* as a matter of law. In Escalante, unlike here, the impartial physician opined that the surgery was warranted, and additional medical evidence was necessary on the issue of the employee's medical condition post-surgery.

> Based on the exam that I performed on 12/23/03, his exam was normal. It was 100 percent normal. Now, how it could have changed so much in basically a month is I guess up for debate.

(Dep. 14.) Thus, though Dr. Barnard could only speculate as to the reason for the difference in his opinion and that of the employee's surgeon, nowhere did he assume the employee had suffered another injury. In his report, Dr. Barnard clearly based his opinion that the employee was no longer disabled on the § 11A examination and test results, which revealed "no evidence of objective pathology." (Dec. 4.) When presented with medical records of the employee's shoulder surgery at deposition, Dr. Barnard "[did] not alter his 11A report findings and continue[d] to opine that the employee was not a surgical candidate on December 23, 2003 and that the 11A exam was 100% normal . . . ." (Dec. 4.)

Next, the employee argues that the impartial physician made inappropriate credibility determinations, thereby usurping the judge's role as the ultimate arbiter of credibility. There is no support for this contention. Dr. Barnard based his determination that the employee's shoulder and neck strains were causally related to the industrial injury on the history provided by the employee and the medical records. (Dec. 4; Ex. 1, 3; Dep. 13.) The judge specifically noted that he relied on the same history given to Dr. Barnard: "I accept his credible testimony at hearing and the history furnished to Dr. Barnard that the accident happened as claimed." (Dec. 5.) The judge made it clear, however, that he credited the employee's testimony as to pain and inability to work only up to December 23, 2003, the date of the impartial examination. (Dec. 3, 5.) Thereafter, the judge adopted Dr. Barnard's opinion that the employee's injuries had resolved. (Dec. 4, 6.) This was entirely appropriate. See Taylor v. USF Logistics, Inc., 17 Mass. Workers' Comp. Rep. 182, 185 (2003)(judge cannot substitute her own lay opinion on causation or medical disability for that of the § 11A physician where the doctor had the same facts before him as did the judge). Moreover, the doctor's comments at deposition cited by the employee for the proposition that Dr. Barnard made inappropriate credibility determinations, go to initial causal relationship, which Dr. Barnard found, not to medical disability at the time of the examination. [2] As such they were harmless. Cf. Moynihan v. Wee Folks Nursery,

[2] The employee points out that Dr. Barnard testified:

Inc., 17 Mass. Workers' Comp. Rep. 342 (2003)(judge erred in basing causal relationship determination on impartial physician's misgivings that a specific incident occurred).

Finally, the employee asserts that the impartial physician's deposition testimony contradicts his written report, and therefore the judge should not have relied on it. The employee alleges that, in his report, the impartial physician causally related the employee's neck and shoulder injuries to the industrial accident while, in his deposition testimony, he expressed some skepticism as to causal relationship. (Employee br. 5; Dep. 16.) We see no contradiction. As discussed above, though some statements in his deposition could be read as expressing doubt as to initial causation, Dr. Barnard nevertheless maintained the opinion, expressed in his report, that the employee's shoulder and neck injuries were causally related to his work injury. His medical opinion was that the employee's disability had resolved by the time of the examination. There was no error in the judge's reliance on that opinion. See Taylor, supra.

The decision is affirmed.

So ordered.

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Bernard W. Fabricant
Administrative Law Judge

And the other thing is, of course, that when he went to Dr. Grabias on 5/14[/03], he was complaining of shoulder pains, he said, but there's no mention in Dr. Grabias' note of any shoulder pains or neck pains and, you know, you think to yourself, well, that doesn't make any sense. But anyway, there we are.

. . . .

Well, typically, if you hurt yourself, you would think that by six days later, you should be exhibiting some signs and symptoms. I would think it would be most unlikely not to.

(Dep. 16.)

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Martine Carroll
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

Filed: February 16, 2006