COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO.: 005624-00**

Alfredo A. Argueta	**Employee**
Massachusetts Institute of Technology	**Employer**
Massachusetts Institute of Technology	**Self-insurer**

REVIEWING BOARD DECISION
(Judges Levine, Costigan and Maze-Rothstein)

APPEARANCES
William N. Batty, 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

LEVINE, J. The employee appeals from a decision in which an administrative judge denied and dismissed his claim for further workers' compensation benefits stemming from an accepted industrial low back injury. The employee argues, inter alia, that the judge failed to make subsidiary findings with regard to the medical evidence sufficient to support his conclusion that the employee had no loss of earning capacity beginning on June 12, 2001. While we agree that the judge's medical findings could have been more thorough, we nonetheless affirm the decision.

The employee worked as a laboratory animal technician, and sustained a herniated disc at L4-5 on December 20, 2000 while lifting objects. (Dec. 4.) On January 19, 2001, Mr. Argueta underwent a L4-5 hemilaminectomy and discectomy. The employee's condition improved, and as of March 15, 2001 his treating physician, Dr. Eskandar, cleared him to return to his regular job with restrictions against lifting more than forty pounds. (Dec. 5; Exs. 4 and 5.) The employee returned to work on March 15, 2001, subject to those restrictions. (Dec. 5.) Although the job "involved constant physical activity, [it] was not strenuous," (Dec. 4), as it did not require him to lift in excess of forty pounds. Id. However, due to a series of incidents -- including sleeping on the job, improperly addressing a co-worker and failure to report to work -- the employee faced disciplinary action, and was finally terminated on June 19, 2001. (Dec. 6-7.)

On February 19, 2002 the § 11A physician, Dr. Mark M. Berenson, examined the employee. Dr. Berenson opined that the employee had sustained a herniated disc at L4-5 on the right which necessitated disc excision on January 19, 2001. He also opined that the employee could return to his employment as an animal technician so long as it did not require heavy vigorous activities; Dr. Berenson imposed a lifting restriction of less than forty pounds. The judge adopted this opinion. (Dec. 5-6.)

The judge allowed additional medical evidence for the disputed period of disability prior to the § 11A examination, from June 12, 2001 until February 19, 2002. (Dec. 3.) The employee introduced medical reports and records of doctors G. P. Massand, Jessica M. Mega and Stephanie A. Nonas. (Ex. 13.) The insurer introduced the report of Dr. Kevin Bozic. (Ex. 12.)

The judge noted that the opinion of Dr. Berenson mirrored the opinions of the employee's physician, Dr. Eskandar, who released the employee to return to work with lifting restrictions on March 15, 2001. (Dec. 5; Ex. 5.)[1] The judge concluded that the employee was incapacitated due to his industrial injury only until he returned to work on March 15, 2001. The judge determined that, while the employee was partially disabled due to his lifting restriction of forty pounds, he had the physical capability to perform his former job as an animal technician. Thereafter, the judge concluded, the employee's employment was properly terminated in accordance with the employer's established procedures and due to the employee's workplace conduct. (Dec. 7-8.)

The employee argues that the judge erred in finding that the employee was not incapacitated between March 15, 2001, when the employee returned to work, and February 15, 2002, the date of the impartial examination. Although it would have been better practice for the judge to have dealt specifically with the medical evidence for that period of time, there is no error. The judge effectively, (Dec. 5), adopted the opinion of Dr. Eskandar, the employee's treating physician, that the employee could return to work with a forty pound lifting restriction on March 15, 2001, (Ex. 4), which opinion the doctor reiterated on April 6, 2001. (Ex. 5.) That restriction remained the same on February 19, 2002, based on the adopted opinion of Dr. Berenson, who conducted an impartial examination on that date. (Dec. 5-6.) Therefore, the only question that remains is whether the employee's medical condition changed at any time during the course of the eight months from the commencement of the claimed incapacity, June 12, 2001, until the

[1] Dr. Eskandar's reports were admitted in evidence, (Dec. 1, 2); there is no claim of error.

February 19, 2002 impartial medical examination. The employee himself testified that there was no difference in the pain on the date of the hearing, August 27, 2002, compared to June 2001. (Tr. 46-47.)[2] Under these circumstances, there was no error in the judge's finding. As we recently stated in Cugini v. Town of Braintree School Dep't, 17 Mass. Workers' Comp. Rep. 363 (2003), analyzing the necessity for additional medical evidence to address the pre-examination "gap":

> [W]e have not adopted a per se rule regarding the adequacy or inadequacy of the § 11A medical report regarding the pre-examination period. . . . The [impartial] doctor's opinion could support the inference that the employee's medical status, from the commencement of his claim . . . until the impartial examination . . . was essentially unchanged. See Conroy v. Fall River Herald News Co., 306 Mass. 488, 493 (1940)("Not infrequently an inference is permissible that a state of affairs . . . proved to exist, has existed for some time before").

Id. at 366. See also Miller v. M.D.C., 11 Mass. Workers' Comp. Rep. 355, 357 n.3 (1997)(lay testimony of uninterrupted symptomatology can support award of benefits for prior period of disability lacking contemporaneous medical opinion). Thus, where the "bookends" of medical evidence mirror each other as to the employee's forty pound lifting restriction; where the employee's job duties were within that limitation; and where the the employee testified at hearing that his pain was unchanged, there was no error in failing to make findings as to the admitted medical evidence during that period.[3]

The employee's other arguments on appeal merit only brief discussion. There was no error in the judge's reference to and reliance on Exhibits 6, 7 and 9 (unobjected-to on the basis of hearsay). These documents related to the employee's disciplinary problems leading to his termination of employment. The employee, according to the judge's decision, did not leave his employment because of his medical condition; rather, he left because of his own misconduct. (Dec. 6, 7-8.) Evidence that the employee left work for a

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[2] There are two volumes of transcript for the hearing, which took place on August 27, 2002. The references to the transcript in this decision are to the first volume.

[3] None of the medical evidence admitted on behalf of the employee, (Ex. 13), contains opinions as to the extent of the employee's disability. On the other hand, the report admitted on behalf of the insurer included the opinion that the employee has a forty pound lifting restriction. (Ex. 12.)

reason unrelated to his industrial injury is obviously relevant. "In the case at hand we have 'an employee who, although capable of doing so, chose [through his conduct at the workplace] not to earn wages.' " Baribeau v. General Elec. Co., 14 Mass. Workers' Comp. Rep. 263, 265 (2000), quoting Vass's Case, 319 Mass. 297, 300 (1946). The employee's argument is thus without merit. Similarly, the fact that the employee ceased working at the concurrent employment and that the judge did not consider that in determining the employee's current earning capacity was not error. Although the employee testified that that work was a cleaning job, including handling a "big bucket of water," (Tr. 43), there was no evidence that the demands of that job exceeded the physical restrictions imposed by the physicians whose opinions the judge adopted. Finally, the judge was well within his authority to find, on the evidence presented, that the employee had minimal treatment for his back since he left work in June 2001. (Dec. 5.)

Accordingly, we affirm the decision.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Filed: May 4, 2004