COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NOS. 038560-00 012066-01**

Andrew Leppo	Employee
Rusco Steel Company/Regis Steel Corp.	Employer
National Union Fire Insurance Company	Insurer
Liberty Mutual Insurance Company	Insurer

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

APPEARANCES
Steven H. Kantrovitz, Esq., for the employee
Mark H. Likoff, Esq., for National Union Fire Insurance Company
Jean Shea Budrow, Esq., for Liberty Mutual Insurance Company

LEVINE, J. The employee appeals an administrative judge's decision denying his claim for ongoing G. L. c. 152, § 35, partial incapacity benefits for a work-related back injury. The employee contends that the judge erred by failing to consider the deposition testimony of the impartial physician. See G. L. c. 152, § 11A. We recommit the case for the judge to consider that deposition testimony and to make further findings on the extent of the employee's incapacity.

The judge found that the employee suffered separate industrial injuries to his back on September 20, 2000 and April 5, 2001. (Dec. 708.)[1] Relying on the written § 11A impartial report of Dr. John F. McConville, the judge found in his December 23, 2002 decision that the employee's incapacity ended on October 31, 2001, the day before the

[1] The employer was insured by two different insurance companies on the two dates of injuries. The decision holds the second insurer, National Union Fire Insurance ("National Union"), liable after April 5, 2001. (Dec. 708.) No issue on appeal is made as to that finding.

impartial examination took place. (Id.)[2] The judge explained: "I accept the employee's credible testimony concerning the history of the work injuries and his complaints of continuing low back pain. I can accept that he continues to have a bad back. However, Dr. McConville was persuasive when he wrote that there was no objective basis upon which to base an ongoing disability finding." (Dec. 708-709; emphasis added.)

The problem presented in this case is that the judge did not consider the deposition of Dr. McConville, the impartial physician. In that deposition, Dr. McConville reviewed, without objection, an MRI study of the employee, taken after his own examination of the employee. As a result of his review, Dr. McConville changed his opinion as to the objective basis for the employee's symptoms and as to the extent of the employee's disability. (See, e.g., Dep. 47, 48, 52, 53, 54, 55-56, 65.)

Dr. McConville's deposition was taken on May 28, 2002, many months before the December 23, 2002 decision issued.[3] In his initial decision, the judge reported that Dr. McConville "was not deposed." (Dec. 706.) By date of January 6, 2003, the employee moved for reconsideration of the hearing decision on the bases that Dr. McConville was deposed and that the doctor's opinion expressed in the deposition supports the employee's case. (Board file.) In apparent response, on January 22, 2003, the judge issued a corrected decision replacing the above-quoted language and substituting therefor the following: "No deposition of the impartial doctor was submitted into evidence."

The circumstances here warrant a recommittal for the judge to consider the deposition testimony of the impartial physician. At the close of the lay testimony hearing on April 11, 2002, the judge stated that there would be a meeting in the future as to "any § 11(A) motions. And so it will occur after the deposition is done and the transcript is in

[2] The impartial physician's testimony was the only expert medical evidence in this case.

[3] The deposition transcript is in the board file. We take judicial notice of the documents in the board file. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002).

hand . . . ." (Tr. 89.)[4] By date of May 10 or May 13, 2002, National Union's attorney moved to "grant enlargement of time within which to take the deposition of the impartial physician . . . and provide the transcript to the Administrative Judge . . . ." (Board file.) Apparently, that motion was granted because on or about June 7, 2002 the attorney for the first insurer, Liberty Mutual Insurance Co. ("Liberty"), requested a continuance of a status conference scheduled for June 13, 2002, because, inter alium, "the deposition transcript of the impartial physician is still not available for use at the status conference on June 13, 2002." (Board file.) Furthermore, National Union, in its brief, states that "[o]n May 28, 2002, the [d]eposition of the [i]mpartial [p]hysician was taken . . . ." (Brief, 2.)[5] By letter dated November 8, 2002, National Union's attorney wrote the administrative judge on the issue of the employee's earning capacity. In the course of that letter, the attorney stated, "As you are aware, we have already . . . taken the deposition of the impartial physician." (Board file; emphasis added.) In its closing argument dated December 12, 2002, National Union stated that "[t]he deposition of Dr. McConville was conducted on May 28, 2002 . . . ," (Closing argument, 3, in board file), and that "Dr. McConville was deposed on May 28, 2002." (Id. at 6.) In at least eight instances, the closing argument cited to specific pages in that deposition. (Id. at 6.)[6]

"Either party shall have the right to engage the impartial medical examiner to be deposed for purposes of cross examination." G. L. c. 152, § 11A(2). "An administrative judge shall authorize the testimony by deposition of the impartial physician." 452 Code Mass. Regs. § 1.12(5)(a). See also Iandosca v. Rotman Elec. Co., 10 Mass. Workers' Comp. Rep. 558, 561 (1996)("Under the terms of § 11A, the impartial medical

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[4] Unfortunately, any additional meetings between the judge and the attorneys were not stenographically recorded. Whenever possible, important conferences between the judge and the attorneys should be stenographically recorded, so that a record is preserved.

[5] The employee in his brief asserts that a status conference was held on July 10, 2002, during which the "medical deposition" was discussed. (Employee brief, 2.) The insurers are silent in their briefs regarding this assertion. See footnote 4, supra.

[6] No closing arguments from the employee or Liberty are in the board file.

examiner's report -- and by extension his depositional testimony -- have prima facie impact"). It would be a hollow right indeed if the parties exercise their right to depose the impartial physician but do not have the deposition considered by the judge. In Martins v. Jefferson Smurfit Co., 15 Mass. Workers' Comp. Rep. 51 (2001), the deposition of the impartial physician was not in the file. The reviewing board recommitted the case for the judge to determine whether the deposition was filed, and if it was, to consider that testimony. Id. at 52-53. In the present case, the deposition is in the file. Its cover letter states that it was filed with the judge on June 15, 2002. The judge here need not engage in the exercise of determining when in fact the deposition was filed. In the circumstances, he must consider it.

As already pointed out, in several writings to the judge, he was informed that the parties were undertaking to depose Dr. McConville. In its closing argument, National Union specifically referred to the deposition and its contents. Although no judge can be expected to remember every detail of every pending case, here, where the closing argument -- presumably the last document the judge received and read -- highlighted the contents of the deposition, the judge should have undertaken to consider the deposition in deciding the case. "Our judicial system is not 'a mere game of skill or chance' in which the judge is merely an 'umpire.' " O'Connor v. City Manager of Medford, 7 Mass. App. Ct. 615, 619 (1979). To have considered the report of the impartial physician, but not to have considered the cross-examination in the deposition, is to work a denial of due process in the present case. See O'Brien's Case, 424 Mass. 16 (1996); Martin v. Colonial Care Ctr., 11 Mass. Workers' Comp. Rep. 603 (1997)(impartial report excluded from evidence on due process grounds where impartial physician unavailable to be deposed and cross-examined); Tejada v. Copley Square Hotel, 14 Mass. Workers' Comp. Rep. 220 (2000)(same). This is especially so where, as here, the impartial physician, after receipt of important new information, dramatically changed his opinion.[7] It is unfair to the

[7] In such circumstances, "[t]he opinion of an expert which must be taken as his evidence is his final conclusion at the moment of testifying." Perangelo's Case, 277 Mass. 59, 64 (1931). See also Carmichael v. A.T. & T. Technologies, 9 Mass. Workers' Comp. Rep. 791, 792-793 (1995).

parties that they should suffer adverse consequences if the deposition was not filed through no fault of their own. Moreover, if the failure to file a deposition can be done with impunity, then unscrupulous parties in receipt of a deposition adverse to their interests could deliberately fail to file the deposition, and thus work an injustice. The judge must guard against such possibility.[8]

Accordingly, we vacate the decision and recommit the case to the judge to consider the deposition of Dr. McConville and to make new findings on disability and extent of the employee's incapacity.

So ordered.

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Frederick E. Levine
Administrative Law Judge

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Martine Carroll
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge

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Filed: **October 16, 2003**

[8] It is the practice in this agency that the testimony of the medical doctors at hearing is by deposition. Although doctors do not appear in person, their testimony is treated the same as other witnesses. But see Cook v. Somerset Nursing Home, 8 Mass. Workers' Comp. Rep. 164, 165 (1994)(difference in determining "credibility" of an expert who testifies by deposition as compared to a witness who testifies in person).