COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 010722-00**

Anthony Battaglia	Employee
Analog Devices	Employer
Sentry Insurance Co.	Insurer

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

APPEARANCES
David R. Lucas, Esq., for the employee
Richard J. Florino, Esq., for the insurer

WILSON, J. The insurer appeals from a decision awarding the employee G. L. c. 152, § 34A, benefits, along with closed periods of § 34 benefits. We discuss three of the insurer's dispositive arguments, reverse the decision in part, and recommit the case for further findings.

The employee injured his right, upper back on the job on March 6, 2000, which injury the insurer accepted. (Dec. 5, 9.) The employee treated with Dr. John Kidd, who recommended no work and physical therapy. Dr. Kidd cleared the employee to return to work on April 17, 2000, with the limitation that he not lift or push over twenty-five pounds. The employee, however, left work on May 22, 2000, after seeing a neurosurgeon, Dr. David Roth, who recommended that he stop working. (Dec. 5.)

The employee's claim was for various closed periods of § 34 benefits, along with ongoing § 34 benefits from November 28, 2000. Although the judge listed the employee's claim as also for permanent and total incapacity benefits under § 34A, he notes in his decision that this "claim" was put forward by the employee in his Proposed Rulings of Law (Closing Argument). (Dec. 2.) It was this back door "claim" that was the basis for the judge's award of § 34A benefits.

The employee was examined by a § 11A physician, Dr. Joseph Abate, on February 22, 2001. (Ex. 3.) Dr. Abate opined that the employee suffered a "traumatic aggravation of cervical spondylosis" and a small, focal, midline disc herniation at the C3-4 level, and diagnosed symptom magnification. (Dec. 5.) The doctor described the employee's symptom magnification as a "control mechanism" that could have been conscious or unconscious. (Dec. 5-6.) Dr. Abate opined that the employee was permanently, partially disabled, having reached a medical end result, and recommended work restrictions of no more than occasional fifteen pound lifting, no lifting above shoulder level on his right side, and no pushing or pulling over fifteen pounds. (Dec. 6; Dep. 34.)

The employee introduced vocational expert testimony of Carol Falcone. (Dec. 6.) Ms. Falcone concluded that the employee was not employable on the open labor market, because he lacked the physical stamina and work skills needed for even a non-skilled, entry level sedentary job, given his age (64), limited education, lack of transferable skills, and limited physical capacity. (Dec. 7-8.) The judge adopted Ms. Falcone's opinion. (Dec. 8.)

Based on the vocational expert testimony, the medical restrictions of the impartial physician, Dr.Abate, as well as those of Dr. Kidd and the insurer's independent medical expert, the judge awarded the employee permanent and total incapacity benefits. (Dec. 9-10.)

As an initial matter, and because the employee does not dispute the contention, we agree with the insurer that the judge's treatment of the employee's closing argument as a de facto motion to amend his claim and join the issues of § 34A benefits was arbitrary and capricious. The judge's action resulted in a violation of the insurer's due process rights. See Casagrande v. Massachusetts Gen. Hosp., 15 Mass. Workers' Comp. Rep. 383, 387-388 (2001). The insurer had absolutely no opportunity to defend and present evidence pertinent to this "claim." As a result, we reverse the order of § 34A benefits.

On recommittal the judge must also ensure that he is basing his findings solely on the exclusive prima facie evidence medical evidence of the impartial physician. Despite the fact that the judge did not allow – sua sponte or in response to a motion – additional medical evidence, he still refers at numerous points in the decision to the medical reports of the employee's treating physician, Dr. Kidd. A prime example of this straying from the admitted evidence is the judge's *conclusion*, on "disability/incapacity," that the employee was permanently and totally disabled, as "[t]he restrictions of *Dr. Kidd* comported with those recommended by the § 11A physician and the insurer's independent medical examiner."[1] (Dec. 9; emphasis added.) Such reliance and findings based on the employee's and insurer's medical reports have no place in a case tried within the parameters of § 11A(2), absent a ruling upon a motion by a party or on the judge's own initiative that the § 11A evidence is inadequate or the medical issues complex. See § 11A(2). The judge on recommittal should eliminate his references to and reliance on these non-evidentiary medical reports, and clarify his medical disability findings based solely on properly admitted § 11A medical evidence.

Next, the judge must evaluate the employer's job offer. See G. L. c. 152, § 35D. Although the specific offer was based on lifting restrictions that did not comport with those of Dr. Abate, namely work with unqualified lifting up to twenty pounds, (Exhibit 7), rather than work with only *occasional* lifting up to *fifteen* pounds, (Dep. 34-35), the testimony was that the employer would adhere to the restrictions set forth by Dr. Abate. (Tr. 80-81.)

[1] We have compared Dr. Kidd's reports with those of Dr. Abate, the impartial examiner and Dr. Polivy, the insurer's independent medical examiner. See Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n.3 (2002)(reviewing board may take judicial notice of contents of the board file) Dr. Kidd's opinion consistently was that his patient was 100% impaired. Drs. Abate and Polivy, however, opined that the employee had a partial disability with lifting, pushing and pulling limitations.

As a final matter, the insurer raises several other issues that we leave to the administrative judge. He should reexamine the record evidence and make further findings that respond to those issues as set out in the insurer's brief.[2]

Accordingly, we reverse the decision in part as to the § 34A award, and recommit the case for further findings consistent with this opinion.

So ordered.

_____
Sara Holmes Wilson
Administrative Law Judge

Filed: **September 30, 2003**

_____
Martine Carroll
Administrative Law Judge

_____
Susan Maze-Rothstein
Administrative Law Judge

[2] These issues include a discrepancy between the lifting restriction imposed by Dr. Abate and that used by the vocational expert, (Insurer brief 7); conclusory recitations, (Insurer brief 9); the diagnosis of symptom magnification, (Insurer brief 9); and failure to acknowledge and address issues raised by the insurer, including § 1(7A), (Insurer brief 11).