COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 057359-97**

Aregawe Behre Employee
General Electric Company Employer
General Electric Company Self-insurer

REVIEWING BOARD DECISION
(Judges Levine, Carroll and McCarthy)

APPEARANCES
Ronald Malloy, 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 compensation benefits due to a subluxation injury/recurrence to his right thumb. Some of his arguments have merit; therefore, we reverse the decision and recommit the case.

In 1997, the employee suffered an injury to his right thumb due to the repetitive nature of his job. The employee treated conservatively and continued to work. The employee underwent surgery in November 1999, and returned to work within a month as a jig bore operator. The employee was cleared for full duty by his treating surgeon at the time, who noted that he had "progressed beautifully without limitations," and that he had "full range of motion" with "full resolution of pain." The employee continued to see his doctor, who noted that there was full range of motion and no subluxation of the thumb, although pain manifested as of March 2000 was "most probably consistent with arthritic changes." (Dec. 469-470.)

The employee's return to work was not successful. He was cited for poor workmanship in written "contact reports" seven times from February to May 2000. The employee did not complain to his supervisor that his thumb was bothering him during this

period. (Dec. 470-473.) Two days after the issuance of his seventh citation on May 16, 2000, the employee saw his doctor. His doctor noted evidence of instability of the thumb; x-rays demonstrated capsular laxity of his right thumb. His doctor prescribed a splint, and kept him out of work for two weeks. An MRI in July 2000 showed significant instability due to subluxation; in August 2001 the employee underwent fusion surgery. (Dec. 473-474.)

The self-insurer accepted liability for an injury to the employee's thumb. (Self-insurer brief, 1.) It sought and received permission to discontinue payment of weekly benefits as a result of a December 14, 2000 conference. The employee appealed. (Dec. 467.) On March 15, 2001, the employee underwent an impartial medical examination by Dr. Joseph Abate. Dr. Abate was deposed on December 14, 2001. Dr. Abate's diagnoses were traumatic degenerative arthritis of the MP joint of the right thumb and status post right deQuervain's release. (Dec. 475.) Dr. Abate noted the presence of subluxation, which he described as the bones being partly out of joint, but not wholly dislocated. (Dep. 8-9, 15-16, 19-21.) Dr. Abate causally related the traumatic degenerative arthritis and subluxation to the employee's repetitive work, but not to the original deQuervain's condition for which the employee underwent surgery in November 1999. (Dec. 475; Exhibit 3; Dep. 10, 20-21.) Dr. Abate considered the August 2001 surgery medically appropriate, and found the employee partially disabled, with limitations on repetitive thumb pinch motions. (Dec. 475.)

In his decision, the judge made the following ruling:

> I find the impartial doctor's report to be inadequate. I am uncomfortable with his opinion that subluxation is more commonly caused by repetitive use rather than acute trauma. I want to read other doctor's [sic] opinions on that issue. I also would like to have further imputed [sic] on the issues surrounding the facts of this case as I have found them. There were no health-based complaints or excuses made for any of the seven contact reports. The employee's treating doctor issued uniformly optimistic medical reports in the November, 1999 to March, 2000 period. He did not find any instability or subluxation during those months, and those conditions, once present, do not heal without medical intervention. I also find that the employee was not a credible witness. These facts tend to suggest that

> a different conclusion on the issue of causation might be appropriate. However, before I reach such a conclusion, I need to review additional medical opinions.

(Dec. 475-476.) The judge then went on in his decision to rely, (Dec. 478), on the opinion of the self-insurer's expert physician, Dr. Andrew Terrono, who diagnosed a volar subluxation of the joint. Dr. Terrono opined, as quoted by the judge: " 'I cannot relate the MP joint pain, and any treatment for the volar subluxation to the deQuervain's surgery or previous symptoms. As far as I know, he has never had a significant injury and volar subluxation of the joint does not happen without any injury. Therefore, I would suggest it is not related to work.' " (Dec. 476.) The judge concluded that he was not persuaded the employee had suffered a work-related injury. (Dec. 478.) "[T]he first reference to instability and subluxation in the thumb was not made until after the employee received his seventh contact report and after he had every reason to believe that he was to be demoted to a less well paying position with the employer." (Dec. 479.)

The employee contends that the judge's ruling that the impartial physician's evidence was inadequate was arbitrary and capricious. The reason cited by the judge for his ruling was that he was "*uncomfortable* with [Dr. Abate's] opinion that subluxation is more commonly caused by repetitive use rather than acute trauma" and also that he found the employee not credible. To the judge, this "suggest[ed] that a different conclusion on the issue of causation might be appropriate." (Dec. 475-476; emphasis added.)

The employee is correct. An impartial physician's opinion is not rendered inadequate by the judge's subjective reactions upon reviewing the doctor's testimony. "Inadequacy" is measured objectively against the requirements of § 11A(2)(i)-(iii). Goodall v. Friendly Ice Cream, 11 Mass. Workers' Comp. Rep. 393, 395 (1997). There is nothing inadequate about Dr. Abate's opinion that the type of subluxation presented by the employee was caused by repetitive use. (Dep. 10.) The opinion satisfies the requirement of § 11A(2)(iii) that the doctor address causal relationship.

Moreover, the judge never explained what his credibility findings regarding the employee's testimony had to do with the adequacy of Dr. Abate's causal relationship opinion. There was no dispute that the employee performed repetitive work. The

medical question was whether the repetitive work caused the subluxation. The judge found probative the fact the employee did not make health based complaints in association with his problems performing his work. (Dec. 476, 478.) However, this is not relevant to the impartial physician's opinion. Dr. Abate's opinion on causal relationship was not based on contemporaneous complaints. At no time did Dr. Abate alter his opinion regarding causal relationship between the work and the subluxation based on the lack of complaints, even though that evidence was presented to him. (Dep. 12-20.) See Shand v. Lenox Hotel, 12 Mass. Workers' Comp. Rep. 365, 368 (1998) (judge cannot reject opinion of impartial physician when that physician considered all the relevant facts). The judge never offered an appropriate explanation, if there could be one, as to how his credibility findings regarding the employee's citations for improper workmanship were germane to the adequacy of the doctor's causal relationship opinion. See Frey v. Mulligan Inc., 16 Mass. Workers' Comp. Rep. 364, 366-367 (2002); Pittsley v. Kingston Propane, Inc., 16 Mass. Workers' Comp. Rep. 349, 351 (2002).

As a result, the judge's ruling of inadequacy cannot stand. We stated the following in Shand v. Lenox Hotel, 14 Mass. Workers' Comp. Rep. 152, 155 (2000):

> [T]he judge found [the impartial doctor's] opinion not credible on the basis that he disagreed with the doctor's causation opinion. (Dec. II. 931.) [Footnote omitted.] Once again, simply to disagree with the only medical opinion, which is otherwise without fault, is error. Shand, supra at 368. [Footnote omitted.] The judge cannot reject the uncontradicted prima facie opinion of [the impartial doctor] on the basis that the judge disagrees with that opinion. "[W]ithout a rational basis for doing so," Paolini v. Interstate Uniform, 11 Mass. Workers' Comp. Rep. 322, 324 (1997), "the judge was not free to disregard the impartial's expert opinion. . . ." Id.

We can only read the judge's statement that he was "uncomfortable" with Dr. Abate's opinion as indicating his uninformed disagreement with it. We therefore reverse the judge's allowance of additional medical evidence.[1] The only medical evidence properly in the record was that of Dr. Abate.

---

[1] The judge apparently did not find the medical issues complex, which, when appropriate, is a basis for the admission of additional medical evidence. § 11A(2).

Furthermore, the judge made this erroneous ruling without notifying the parties prior to filing his decision. We have previously stated that this error alone requires recommittal. In Gulino v. General Elec. Co., 15 Mass. Workers' Comp. Rep. 378 (2001), "the judge allowed the parties to introduce their own medical evidence to address the employee's medical status during the 'gap' period from the date of injury until the impartial examination. (Dec. 304; Addendum to the Dec. 318.)" Id. at 379. Then, "after the close of the record and without further communication with the parties, in the hearing decision the judge ruled that the impartial physician's opinion was inadequate as to continuing causal relationship, and that additional medical evidence was necessary for that issue, as well as the 'gap' period. (Dec. 301, 304; Addendum, 318-319.)" Id. at 379-380. We concluded:

> Having changed the scope of his § 11A inadequacy ruling to include a primary issue in the litigation – continuing causal relationship between the work injury and the employee's present disability – the parties had a right to have the opportunity to put forward evidence on that dispute. See O'Brien's Case, 424 Mass. 16, 23 (1996)(failure of due process results from foreclosing "opportunity to present testimony necessary to present fairly the medical issues"). Here, the parties had the right to take depositions, both to challenge their opponent's medical evidence and to bolster their own. The judge could not procedurally cut off the parties' opportunity to develop their cases in that manner.

Gulino, supra at 381. The present case is arguably even more egregious. Without authority or notice to the parties, the judge relied in his decision on medical reports submitted solely for the conference and for the impartial examination. Moreover, he identified these exhibits in his decision as if they were introduced by the parties.[2] Such aberrant action is contrary to law.

[2] In Gulino, supra, the parties at least knew that the additional medical reports *which they had submitted* were properly in evidence, i.e., the "gap" medicals. Moreover, the judge had an explanation, albeit erroneous, as to why he did not notify them about his expanded use of those materials. See id. at 380, quoting Addendum, 319. By comparison, in the present case, even those factors are absent.

Accordingly, we reverse the decision and recommit the case for further proceedings. Due to the unusual circumstances presented by the case, and the reasons for the recommittal, compare Palmer v. Palmer, 23 Mass. App. Ct. 245, 253 (1986), we transfer the case to the senior judge for reassignment to a different administrative judge and a hearing de novo.

So ordered.

____
Frederick E. Levine
Administrative Law Judge

____
William A. McCarthy
Administrative Law Judge

____
Martine Carroll
Administrative Law Judge

FEL/kai
Filed: **June 2, 2003**