COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 026209-03**

Arthur LaFleur	Employee
H. P. Hood, Inc.	Employer
Sentry Insurance Co.	Insurer

REVIEWING BOARD DECISION

(Judges Costigan, Horan and Fabricant)

APPEARANCES

Earlon L. Seeley, III, Esq., for the employee
Eugene M. Mullen, Jr., Esq., for the insurer

COSTIGAN, J. The insurer appeals from a decision in which the administrative judge awarded the employee § 34 total incapacity benefits for an accepted work-related back injury. The insurer contends the impartial medical evidence strayed outside of the parameters of the medical dispute, as defined by the parties' medical records submitted at the time of the § 10A conference. Citing this board's decision in Ruiz v. Unique Applications, 11 Mass. Workers' Comp. Rep. 399 (1997), the insurer argues that allowance of additional medical evidence was mandated as a matter of law. For the reasons that follow, we disagree and affirm the decision.

The employee, sixty-two years old at the time of the hearing, injured his back on August 13, 2003 while working as a tractor-trailer driver. He continued working for over a year until he stopped on December 19, 2004. He underwent low back surgery in January 2005. The insurer voluntarily commenced payment of § 34 total incapacity benefits, but later filed a complaint for modification of weekly compensation. Following a § 10A conference on September 13, 2005, the judge issued an order assigning the employee a prospective $300 weekly earning capacity and awarding the concomitant § 35 partial incapacity benefit, effective October 15, 2005. The parties cross-appealed to an evidentiary hearing, at which the only issue identified by the parties was the extent of disability. (Dec. 2-3.)

Pursuant to § 11A, the employee underwent an impartial medical examination by Dr. Marc Linson, who opined the employee had, at most, a sedentary or light duty capacity

due to his injury-related physical restrictions. The doctor also opined, however, that given the narcotic pain medications the employee was taking, even such restricted work would probably not be advisable. Although he suggested the employee eventually might be weaned off that regimen of medications, at the time of the examination, Dr. Linson considered the employee's use of pain medications reasonable. (Dec. 3-4.)

At hearing, the insurer's position was that the employee possessed an earning capacity. The employee's medical reports also indicated an ability to work, albeit with restrictions. [1] Therefore, the insurer argued to the judge, the rule of law announced in Ruiz, supra, mandated the allowance of its motion to introduce medical evidence in addition to that of the impartial physician. In Ruiz, the parties disputed whether the employee was totally or partially disabled; in other words, some degree of disability was not in dispute. The impartial physician, however, concluded the employee was not disabled at all. Id. at 400-401. The reviewing board held that because the § 11A physician's opinion of no disability "fell outside the boundaries of the 'dispute over medical issues,' " [2] the § 11A impartial medical evidence was inadequate as a matter of law. Id. at 402, quoting § 11A(2).

The administrative judge responded to the insurer's Ruiz argument:

> I find that [the employee's] medical restrictions are within those contemplated at the conference. Instead, what Dr. Linson does is explore the effects of medication on the employee and [he] takes into account the employee's own testimony as to the effects of that medication in rendering his opinion. As such I find that while Dr. Linson's opinion does explore aspects not covered in the reports introduced at conference it is not outside of the restrictions as outlined at conference. Therefore, I do not open up the medical evidence, based on the factors explored in Ruiz.

(Dec. 2.)

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[1] While not part of the record, we note the parties' agreement as to the content of the medical evidence presented at the conference. (Employee br. 1-2; Ins. br. 3.) Significantly, all of the additional medical reports placed the employee in the sedentary to light duty range of work capacity.

[2] Given the partial disability opinions of his own medical experts, it appears the employee's claim for total incapacity benefits was based on vocational factors. Scheffler's Case, 419 Mass. 251, 256-257 (1994).

We think the judge's handling of the Ruiz issue was correct. There is no indication in the record -- and neither party argues -- that the medical reports presented at the conference, and forwarded to the impartial physician, contemplated the effect of the employee's pain medications on his ability to work. Moreover, there is no indication in the record that the employee's medical condition had changed from the time of the earlier reports to the date of the impartial medical examination. See Ruiz at 403. Therefore, because Dr. Linson's opinion of total medical disability was based on an entirely proper consideration that was not reflected in the parties' respective medical reports, Ruiz simply does not come into play. Cf. Ragucci v. Jo-Ann Fabrics Store, 14 Mass. Workers' Comp. Rep. 210, 213 (2000)(under Ruiz, impartial physician's opinion based on same prior objective testing as that relied upon by parties' doctors, and not based on passage of time, is confined to the medical dispute delineated in those earlier medical reports).

The decision is affirmed. Pursuant to § 13A(6), the insurer is ordered to pay employee's counsel an attorney's fee in the amount of $1,458.01.

So ordered.

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: **May 19, 2008**