COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 023650-97**

Axel Schmidt	Employee
Nauset Marine Inc.	Employer
Credit General Insurance Co./Mass. Insolvency Fund	Insurer

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

APPEARANCES
James K. Meehan, Esq., for the employee
William C. Harpin, Esq., for the insurer

MAZE-ROTHSTEIN, J. The insurer appeals from a decision awarding weekly G. L. c. 152, § 34A, permanent and total incapacity benefits for a work-related injury to the employee's lower back. It raises three issues on appeal. First, the insurer contends error in the rejection of its vocational expert's testimony based on misstatements of fact not material to the issues presented. Second, the insurer argues that the judge should have applied the heightened § 1(7A) causation standard because the employee had pre-existing, non-industrial, left eye macular degeneration. And third, it argues that the adopted vocational testimony was fatally flawed due to consideration of that unrelated eye condition. For the reasons discussed below, we affirm the decision. See G. L. c. 152, § 11C.

At the time of hearing, the employee, Axel Schmidt, was a fifty-three year old widower who had graduated from high school and completed an additional two years of college with a certificate in electromechanical drafting. (Dec. 3.) He was hired by the employer in 1989 with duties that included customizing boat interiors ranging in size from twenty to forty-two feet, a job that constantly required the movement of approximately one hundred thirty-five pound sheets of marine plywood on and off boats in order to shape and cut them to size. (Dec. 3-4.)

In February 1997, the employee began feeling an increased level of lower back discomfort that adversely affected his productivity, but he continued to work until June 1997 when he sought treatment. (Dec. 4.) A laminectomy was performed at that time with no improvement. A second laminectomy with a fusion was performed in March 1998, but the employee continued to experience low back pain and developed left-sided pain that radiated down his left leg. Id. The employee underwent a third surgical procedure in April 2001 and was prescribed a hard brace, narcotic analgesics and physical therapy, the results of which were not very successful. The multiple surgical interventions were to no avail in relieving his back pain. (Dec. 5.)

The initial claim in this matter was accepted and § 34 temporary total incapacity benefits were paid from June 27, 1997, until they were exhausted on June 26, 2000. (Dec. 2.) Subsequently, the employee filed a claim for § 34A permanent and total incapacity compensation, and the matter went to a § 10A conference from which an order issued for payment of § 35 partial incapacity compensation. (Dec. 2, Tr. 3.) The employee and insurer cross-appealed to a hearing de novo.[1] (Dec. 2.)

The judge acknowledged that on February 18, 1997, the employee suffered an accepted industrial injury to his back. (Dec. 13.) As to the extent of incapacity, after considering the employee's vocational profile, his age, and residual physical limitations, the judge found the employee permanently and totally incapacitated.[2] Id.

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[1] Prior to hearing, on the employee's motion to admit additional medical evidence, the judge ruled the § 11A examiner's report inadequate, as it had been eclipsed by the employee's significant medical treatment, including surgery, since the date of examination. (Dec. 2.); see G. L. c. 152, § 11A(2); Deleon v. Accutech Insulation & Contract, 10 Mass. Workers' Comp. Rep. 713, 715 (1996)(a post § 11A report gap period requiring additional medical evidence where important medical event occurs after the § 11A examination).

[2] In his decision, the judge reviewed the additional medical evidence submitted by the parties, including the depositions of the employee's treating physician and the insurer's medical expert. The judge specifically adopted the treating doctor's medical findings that, as of August 2001, the employee was incapable of working, that a second spinal fusion, (his third surgery overall), performed on April 13, 2001, significantly increased the employee's medical disability, that no further surgery was planned, and that the employee was "just about as good as he's going to get." (Dec. 9.) The judge also partially adopted the insurer physician's medical opinions, but only where they conformed to the treating doctor's opinion. (Dec. 10.)

The judge also reviewed the employee's expert vocational testimony by Mr. Albert Sabella, and that of Ms. Susan Gayman offered by the insurer. After considering both experts' testimony, the judge found Ms. Gayman's opinion was negatively affected when she admitted to having mislabeled a number of job descriptions in her labor market survey; he, thus, completely rejected her testimony. (Dec. 7.) The judge found Mr. Sabella's testimony that Mr. Schmidt would be unemployable in the general labor market, to be more persuasive. (Dec. 6-7.)

On appeal, the insurer first contends that the judge improperly rejected the testimony of Ms. Gayman based on misstatements of fact that were not material to the issues presented. (Insurer brief 6.) We disagree.

"We have held that a judge does not have to specify his reasons for rejecting a vocational expert's testimony." Andrews v. Southern Berkshire Janitorial Serv., 16 Mass. Workers' Comp. Rep. 439, 443 (2002), citing Coelho v. National Cleaning Contr., 12 Mass. Workers' Comp. Rep. 518, 521-522 (1998). Further, an administrative judge possesses discretion to use his own judgment and knowledge as to whether vocational expert testimony is helpful in assessing the economic component of an earning capacity. See Sylva's Case, 46 Mass. App. Ct. 679, 681-682 (1999). The judge is required neither to adopt the testimony of an expert vocational witness nor to mention that expert's evaluation in reaching a conclusion on earning capacity. Id. The fact that the administrative judge considers one expert's testimony, but finds it to be unconvincing, is sufficient. Coelho, supra.

Here the judge did exactly that, and more, by giving his reasons for adopting one vocational expert opinion over the other. Aside from Ms. Gayman's self-avowed inaccuracies and misclassifications of specific job descriptions, the judge cited other reasons for choosing Mr. Sabella's testimony instead of Ms. Gayman's.[3] In addition to

[3] At hearing, Ms. Gayman admitted that the job history she used in her report did not reflect as accurately as it could have the employee's actual job history. (Tr. 131.) She also testified that she had completely misclassified specific jobs that the employee had been engaged in and conversely misclassified corresponding positions when considering Mr. Schmidt's employability. (Tr. 120-132.)

having reviewed certain medical records, "*Mr. Sabella had the opportunity to interview the employee . . . and formed an employability opinion based on the composite and compound effect of a number of vocational factors that he considered."* (Dec. 6-7; emphasis added.)

The judge went on to observe that Ms. Gayman had less foundation in her vocational analysis. At hearing, Ms. Gayman acknowledged the importance of job history in considering employability. (Tr. 131-132.) She also testified that her classification of the employee's jobs would change, based on the additional information and degree of detail she received regarding his employment history from his testimony. (Tr. 120-131.) Finally, she prepared a labor market survey based on restrictions contained in the medical records, and based her opinion relevant to positions potentially available to the employee on a number of job descriptions that she had admittedly mislabeled in her survey. (Dec. 7.) The inaccuracies, and the testimony derivative of these misstatements of fact, are material to the issue of Mr. Schmidt's employability. See Reddy v. Charles P. Blouin, 14 Mass. Workers' Comp. Rep. 341, 345 (2000)(expert causality opinion whose foundation is based on misstatements or omissions of material facts is entitled to no weight); Mendonca v. Hillhaven Hallmark NRS, 11 Mass. Workers' Comp. Rep. 223, 227 (1997)(testimony may be rejected if it is based on misstatements of fact that are material to issues presented), citing Buck's Case, 342 Mass. 766, 771 (1961). Moreover, mislabeling jobs certainly goes to the weight of Ms. Gayman's ability to form an opinion with the precision and accuracy expected of an expert. We affirm the judge on this point.

The insurer next contends that the judge should have applied § 1(7A) because the employee had pre-existing, non-industrial, left eye, macular degeneration. (Insurer brief 10). Again, we disagree. Whether the heightened causal relationship standard set out in § 1(7A)[4] applied in the case at hand is academic, as the insurer did not raise it at any time prior to this appeal.

[4] General Laws c. 152, § 1 (7A), as amended by St. 1991, c. 398, reads in pertinent part:

If the insurer wanted to take advantage of the heightened standard of causation, it had the burden of raising § 1(7A) prior to this appeal, and producing evidence at hearing that the employee came within the terms of the statute. Fairfield v. Communities United, 14 Mass. Workers' Comp. Rep. 79 (2000). When an insurer fails to properly raise § 1(7A) as a defense or subsequently does not meet its burden of production, then the employee is taken "as is." Jobst v. Leonard T. Grybko, 16 Mass. Workers' Comp. Rep. 125, 131 (2002).

The insurer here also improperly presupposes that the discussion by the vocational expert relative to the employee's left eye macular degeneration[5] automatically required a § 1(7A) analysis by the judge. (Insurer brief 10.) Its argument is misguided, however, as it failed to raise § 1(7A), and failed to produce any evidence that the industrial injury combined in any way with this pre-existing condition.[6] See Robles v. Riverside Mgmt. Inc., 10 Mass. Workers' Comp. Rep. 191, 194-195 (1996)(discussing combination of work injury and unrelated condition). The insurer's inaction forecloses the issues that the eye condition could have triggered on appeal. Objections, issues or claims, however meritorious that have not been raised below, are generally waived on appeal. Dunlevy v. Tewksbury Hosp., 17 Mass. Workers' Comp. Rep. _____(March 3, 2003), citing Phillips's Case, 278 Mass. 194, 196 (1932); Taylor v. Morton Hosp. and Medical Ctr.

> If a compensable injury or disease [that] combines with a pre-existing condition, which resulted from an injury or disease not compensable under this chapter, to cause or prolong disability or a need for treatment, the resultant condition shall be compensable only to the extent such compensable injury or disease remains a major but not necessarily predominant cause of disability or need for treatment.

[5] The judge notes this condition in his decision as "unrelated medical problems consisting of macular degeneration of his left eye that causes him difficulty with vision." (Dec. 6.) The better practice would have been for the judge to also note that the unrelated condition was not considered in his incapacity analysis.

[6] The insurer had ample opportunity to make these inquiries, as depositions were taken of both doctors whose reports were offered when additional medical evidence was allowed. Further, the employee testified at length as to his twelve-year employment history of physically demanding

Inc., 16 Mass. Workers' Comp. Rep. 30, 34 (2002); Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001), citing Wynn & Wynn, P.C., v. Mass. Comm. Against Discrimination, 431 Mass. 655, 674 (2000). This rule applies to arguments that could have been raised before an administrative agency but were not. Green, supra. See also Dudley v. Yellow Freight Sys., Inc., 15 Mass. Workers' Comp. Rep. 204, 207 (2001)(issues not raised below cannot properly be raised for the first time on appeal).

As to the insurer's final argument that the adopted vocational opinion was flawed at its foundation due to consideration of the unrelated eye condition, the expert's testimony at hearing clarified that he accorded no improper legal weight to that condition in making the vocational assessment. (Tr. 101-102.)

On this record we see no error. The decision is affirmed. Pursuant to §13A(6), employee's counsel is awarded a fee of $ 1273.54.

So ordered.

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Susan Maze-Rothstein
Administrative Law Judge

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Sara Holmes Wilson
Administrative Law Judge

Filed: June 30, 2003

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Patricia A. Costigan
Administrative Law Judge

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work and periods in which he engaged in drafting, designing, writing reports and sketches despite the eye condition. (Tr. 9-17.)