COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 044058-97**

Barbara Carraturo	Employee
Springfield Wire, Inc.	Employer
AIM Mutual Insurance Co.	Insurer

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

APPEARANCES
Bernard J. Romani, III, Esq., for the employee
Ronald C. Kidd, Esq., for the insurer

WILSON, J. The employee appeals from a decision in which an administrative judge denied her claim for permanent and total incapacity benefits and, instead, awarded partial incapacity benefits with an earning capacity of $240.00 per week. The employee argues that the judge failed to employ a sufficient vocational assessment under Scheffler's Case, 419 Mass. 251 (1994), and that the judge erred by excluding the expert testimony of her vocational rehabilitation counselor. We summarily affirm the decision regarding the first issue, and affirm the decision as to the vocational expert issue for the reasons that follow.

The employee suffered a work-related, repetitive aggravation of pre-existing arthritis in her hands, which resulted in surgery on her right thumb and wrist in October 1997. Although she returned to a light duty job with the employer for a time, she was eventually laid off. The present complaint for modification or discontinuance of § 34 benefits came before the administrative judge for hearing, at which time the employee was allowed to join her claim for § 34A benefits. (Dec. 2-3.)

The employee underwent a medical examination pursuant to § 11A(2). The impartial physician opined that the employee suffered from a permanent, partial disability

of both hands, with limitations in using her hands for pinching, gripping, grasping and lifting. (Dec. 4.)

At hearing, the judge excluded the expert opinion testimony of the employee's vocational rehabilitation counselor, because the witness did not state his understanding of the medical restrictions on which he based his opinions, and the expert's opinion thus lacked a proper foundation. (Dec. 3.) The judge concluded that the employee could perform employment activities that did not involve repetitive use of her hands and fingers, (Dec. 4), and that it would not be futile for the employee to attempt to find suitable employment, such as entry level positions as a receptionist, store clerk, or some sort of light assembly job that did not require pinching and grasping. (Dec. 5.) The judge therefore denied the employee's claim for permanent and total incapacity benefits. (Dec. 6.)

The employee asserts that the judge erred in excluding the testimony of his vocational expert. The employee contends that the judge should have allowed the expert opinion, in order to assess how the medical disability established by the § 11A physician impacted her ability to earn. The employee also argues that neither the insurer nor the judge stated a reason for excluding the expert opinion. The employee stresses that the expert testified as to his review of the impartial report and job descriptions, and that he had interviewed the employee and performed a transferable skills analysis. (Employee brief, 6-7.)

We disagree with the employee that the judge failed to explain his reasoning in excluding the expert's testimony. The judge stated in the decision that the opinion lacked a foundation, because the expert never testified as to the medical restrictions that were the basis for his opinion. (Dec. 3.) The judge also stated during the course of the hearing that he did not know which of several medical documents that the expert relied upon in forming his opinion. (Tr. 45.) Indeed, the employee did not inquire into the medical restrictions that his expert considered in reaching his vocational opinion. The expert's vocational evaluation, (Employee's Exhibit A for Identification), lists six categories of medical reports and documents that the expert had reviewed in preparing that report. (Tr.

46.) Only one of these, the § 11A report, was admitted into evidence at the hearing. Thus, it was impossible for the judge to know if the expert's opinion was based on a medical foundation that was the same as that on which the judge relied. See Chamberlain v. DeMoulas Markets, 14 Mass. Workers' Comp. Rep. 187, 191 (2000).

In the instant case, for his opinion to be admissible, the expert could not rely on any medical report other than the information contained in the four corners of the § 11A report. The § 11A report was the exclusive medical evidence, as the judge made no finding that the report was inadequate, or that the medical issues were complex. Barring such a finding, "no additional medical reports or depositions of any physicians [are] allowed by right to any party." § 11A(2). Thus, where the expert's opinion was arguably based on medical reports that were not independently admissible in the proceeding, the opinion itself was inadmissible as well. See Patterson v. Liberty Mutual, 48 Mass. App. Ct. 586, 596-597 and n.16 (2000), citing Department of Youth Servs. v. A Juvenile, 398 Mass. 516, 528-532 (1986); Chamberlain, supra.

As a general matter, moreover, an administrative judge possesses discretion to use his own judgement and knowledge as to whether vocational expert testimony is helpful in assessing the economic component of an earning capacity. See Sylvia's Case, 46 Mass. App. Ct. 679, 681-82 (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 authors of the Handbook of Massachusetts Evidence make the point that in such cases, where expert testimony is appropriate but not essential, the judge's discretion on the question of the propriety of the evidence is given great weight, stating:

> [E]xpert testimony may be essential in certain areas; in others it may not be necessary although appropriate. In these latter situations the discretion of the trial judge seems to be given great weight on the question of the propriety of such evidence. See, e.g., Goldhor v. Hampshire College, 25 Mass. App. [Ct.] 716, 521 NE2d 1381 (1988) (within court's discretion to exclude expert testimony that termination from an academic position makes it difficult to be hired elsewhere in the academic community).

P.J. Liacos, M. Avery & M.S. Broden, Massachusetts Evidence § 7.8.1 (7th ed. 1999).

As the judge did not err in excluding the opinion testimony of the employee's vocational expert, we affirm the decision. We need not reach the employee's other contentions regarding this issue.

So ordered.

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Sara Holmes Wilson
Administrative Law Judge

Filed: **May 29, 2002**

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William A. McCarthy
Administrative Law Judge

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Susan Maze-Rothstein
Administrative Law Judge