COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS	**BOARD NOS.:** 035695-04, 007527-04, 024149-02, 001062-01

Betty A. Woodsum	**Employee**
Health Management Services	**Employer**
Liberty Mutual Insurance	**Insurer**
All Care Resources	**Employer**
AIM Mutual Insurance Company	**Insurer**

REVIEWING BOARD DECISION

(Judges Horan, McCarthy and Koziol)

The case was heard by Administrative Judge Hernandez.

APPEARANCES

Charles E. Berg, Esq., for the employee at hearing
James N. Ellis, Esq., for the employee on brief
Dennis M. Maher, Esq., for Liberty Mutual Insurance at hearing and on brief
Amy Scarborough, Esq., for AIM Mutual Insurance at hearing and on brief

HORAN, J. The employee appeals from a decision denying and dismissing her benefit claims. We affirm the decision in part, and recommit the case for further findings.

The employee filed a claim for weekly incapacity and medical benefits against Liberty Mutual Insurance Company (Liberty), alleging that on November 11, 2004, she injured her neck and left arm at work.[1] (Dec. 5.) Dr. Richard Warnock, the §

[1] The administrative judge also stated the employee sustained injuries to her back in the November 11, 2004 incident. (Dec. 5.) We note the employee did not testify she injured her back on that date; she did testify she injured her back at work on other occasions. (Tr. 8-28, 30, 35-36, 45.)

11A impartial medical examiner, submitted a medical report in advance of the hearing. At the hearing, the judge allowed the employee's motion to join three new injury dates: March 1, 2004,[2] against Liberty,[3] and January 2, 2001,[4] and July 2, 2002,[5] against AIM Mutual Insurance Company (AIM).[6] Following the hearing, the employee deposed Dr. Warnock. Thereafter, the employee moved to submit additional medical evidence. The judge denied the motion,[7] and denied and dismissed the employee's claims. (Dec. 9.)

On appeal, the employee argues the judge's denial and dismissal is tainted by two errors, to wit: his failure to specifically address the three additional dates of injury joined at the hearing, and his refusal to allow the introduction of additional medical evidence in light of Dr. Warnock's deposition testimony. We address these arguments in turn.

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[2] The employee testified she injured her shoulder on this date. (Tr. 29.)

[3] Liberty raised the defenses of liability, causal relationship, § 1(7A), disability, and the extent of disability for the injury dates within its coverage. (Ex. 3.)

[4] The employee testified she injured her neck and left upper extremity in the January 2001 work-related motor vehicle accident. (Tr. 23-24.)

[5] The employee testified she injured her neck at work on this date. (Tr. 28.)

[6] The board file reveals AIM stipulated to the occurrence of industrial injuries on these dates, but raised the issues of notice, claim, causal relationship, § 1(7A), disability, extent of disability, and the successor insurer rule. (Ex. 4, 5.) AIM paid the employee a closed period of §§ 34 and 35 benefits following each injury date. Id.

[7] The employee maintains she did not receive the judge's ruling prior to her receipt of the hearing decision. In light of our order of recommittal, this point is moot.

With respect to the employee's November 11, 2004 injury claim, the judge concluded: "I do not find the employee's testimony credible regarding the manner in which she sustained her injury." (Dec. 8.) Because credibility findings are the sole province of the judge, as fact finder, we affirm that portion of the decision denying and dismissing the employee's claim of a November 11, 2004 injury. Lefebvre v. Sandelswood, Inc., d/b/a The Maids, 21 Mass. Workers' Comp. Rep. 135, 140 (2007) aff'd Lefebvre's Case, 71 Mass. App. Ct. 1124 (2008)(credibility findings will not be disturbed unless they are arbitrary and capricious or derived from inferences which are not reasonably drawn from the evidence) citing Lettich's Case, 402 Mass. 389, 394 (1988), Larti v. Kennedy Die Castings, Inc., 19 Mass. Workers' Comp. Rep. 362 (2005) and Truong v. Chesterton, 15 Mass. Workers' Comp. Rep. 247, 249 (2001). However, the judge's decision addressed only the alleged November 11, 2004 incident; he made no findings, and issued only a general denial, concerning the employee's other pending claims. This error requires recommittal. G. L. c. 152, § 11B.[8]

In light of our disposition of the first issue, we briefly address the second. The employee claims the judge erred by denying her motion to admit additional medical evidence. We cannot tell from the record whether the judge was mindful of the three other claims before him when he denied the motion. What is clear is that Dr. Warnock offered no opinion with respect to the employee's work-related January 2, 2001 motor vehicle accident:

> Q: So my question is what role, if any, does the 2001 motor vehicle accident play in her neck complaints in 2004?
>
> A: I have no opinion one way or the other.

[8] General Laws c. 152, § 11B, provides, in pertinent part:

> Decisions of members of the board shall set forth the issues in controversy, the decision on each and a brief statement of the grounds for each such decision.

(Dep. 24.) This testimony left a void in the medical evidence with respect to the January 2, 2001 injury date.[9] See O'Brien's Case, 424 Mass. 16 (1996)(judge's decision to foreclose further medical testimony where necessary to present fairly the medical issues grounds for reversal or recommittal); Lorden's Case, 48 Mass. App. Ct. 274 (1999)(where § 11A impartial medical examiner opinion was not based on facts in evidence, or on facts found, judge should have admitted additional medical evidence). Accordingly, on recommittal additional medical evidence must be allowed, at the very least,[10] to fairly address the 2001 injury date.[11] See O'Brien, supra at 22-23.

We affirm the decision insofar as it denies and dismisses the employee's claim of a November 11, 2004 injury. We recommit the case to the judge for further findings on the employee's claims with respect to the remaining three injury dates.

So ordered.

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Mark D. Horan
Administrative Law Judge

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William A. McCarthy
Administrative Law Judge

[9] We also note that Dr. Warnock was uncooperative when asked to address hypothetical questions posed by employee's counsel. (Dep. 11-12, 20-21.)

[10] Additional medical evidence may also be necessary to address the other remaining injury dates. But see footnote 11, infra.

[11] This order of recommittal is not intended to provide the employee with a second opportunity to develop such evidence. On recommittal, only medical evidence in existence prior to the date the evidence closed at hearing shall be admissible.

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Catherine Watson Koziol
Administrative Law Judge

Filed: **April 6, 2009**