COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 024593-14**

Brian Collins	Employee
Progressive Roofing Co.	Employer
Transportation Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Long, Fabricant and Koziol)

This case was heard by Administrative Judge Bean.

APPEARANCES
Michael L. Tyner, Esq., for the employee
Martin T. Sullivan, Esq., for the insurer

LONG, J. The insurer appeals the February 28, 2019, hearing decision ordering it to pay § 34A, permanent total incapacity benefits. It argues that the judge erred, first, by not discussing a vocational witness' testimony, and second, by finding the impartial report inadequate and allowing additional medical evidence. We summarily affirm as to the first issue. Finding no merit to the insurer's other argument presented on appeal, we affirm the judge's decision.

The employee initially prevailed on his claim for § 34 and §§ 13 and 30 benefits before the same administrative judge, who issued a prior hearing decision on September 6, 2016, for ongoing § 34 weekly benefits in the amount of $454.34 and §§ 13 and 30 benefits. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(reviewing board may take judicial notice of documents in the board file).[1] That decision provided:

[1] The September 6, 2016, hearing decision will be referred to as "Dec. I." The same administrative judge also issued what he referred to as the "fee fight" hearing decision on March 7, 2018, involving disputed attorney's fees for several unrelated cases, one of which involved the employee. The March 7, 2018, hearing decision will be referred to as "Dec. II" and the February 28, 2019, decision under appeal here, will be referred to as "Dec. III."

> I find that the employee suffered an industrial accident on September 18, 2014 that injured his back and left calf. These injuries have caused him to be totally disabled since the date of the industrial accident. In making these determinations, I rely on the credible testimony of the employee and the persuasive medical opinions of Dr. Morley. I also rely on the reports of Dr. Piscopo and his staff in identifying at an early stage the possibility and then likelihood that the employee's symptoms emanated from his low back as well as his calf. . . .
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> WHEREFORE, it is ordered:
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> 1. That the insurer pay to the employee §34 temporary total disability compensation from September 18, 2014 to the present and continuing. With an average weekly wage of $757.24 his weekly compensation rate is $454.34.
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> 2. That the insurer pay for all of the reasonable and necessary medical treatment related to the September 18, 2014 work injury pursuant to §§13 and 30.

(Dec. I, 180, 181.) No appeal was filed.

With the establishment of liability for a calf injury and low back injury as a backdrop, the employee filed his § 34A claim that was procedurally blocked by the "fee fight" case (Dec. II.) referenced earlier. The judge explained the somewhat convoluted procedural history as follows:

> Because of the "fee fight" case, the employee was not allowed to file a claim for § 34A permanent and total disability compensation. I allowed the employee to join the issue to the "fee fight" case and then I bifurcated the issues. Because of this there has never been a conference held on the employee's § 34A claim. The employee was examined pursuant to § 11A by Dr. Ralph Wolf, an impartial medical examiner. He had previously examined the employee pursuant to § 11A on March 5, 2015.

On the record during the third hearing concerning the employee's § 34A claim, the judge stated he was admitting Dec. I as Exhibit 4. However, the exhibit entered into the board file as hearing exhibit 4 is actually Dec. II, the judge's decision regarding the "fee fight." (Dec. III, Ex. 4.) We treat this as an administrative error as the parties and the judge clearly operated with the understanding that only the first decision, Dec. I, has any relevance to the matters at issue in the present case.

(Dec. III, 583.) Dr. Ralph Wolf's[2] §11A report dated June 29, 2018, provided in pertinent part:

> DIAGNOSIS:
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> 1. Left calf contusion.
> 2. Lumbar degenerative disk disease.
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> WITH RESPECT TO CAUSALITY:
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> 1. The patient had noted no left leg injury prior to the 09/18/14 work injury. The patient's pain and subsequent treatment is therefore secondary to his 09/18/14 work injury.
> 2. The patient had noted no lumbar pain nor abnormalities prior to the 09/18/14 work injury. The patient's lumbar pain began 5 months after the 09/18/14 work injury. The patient's arthritic changes noted on the lumbar MRI may have preceded his 09/18/14 work injury. However, the present degenerative disk disease and foraminal encroachment became symptomatic 5 months after the 09/18/14 work injury. At least some of the patient's pain may be secondary to the 09/18/14 work injury.

(Dec. III, Ex. 3.)

At the conclusion of the November 7, 2018, hearing addressing the employee's § 34A claim, employee's counsel presented an oral motion asking the judge to find Dr. Wolf's impartial report inadequate due to his equivocal opinion regarding causation. The judge agreed and allowed the introduction of additional medical evidence over the insurer's objection. Once the parties submitted their respective additional medical evidence, the judge issued his decision, and the insurer appealed.

[2] A review of Dec. I reveals that the employee was previously examined by impartial physician, Dr. Ralph Wolf on March 5, 2015, after which, on August 17, 2015, the employee presented a motion to amend his claim, joining an alleged low back injury, which the judge allowed. Because Dr. Wolf only addressed the employee's calf injury and not the alleged low back injury, another impartial examination addressing the back injury, took place on January 7, 2016, with Dr. Peter Grillo. The judge eventually allowed the introduction of additional medical evidence at the hearing on May 26, 2016.

The insurer argues the judge erred in finding the impartial report inadequate and in opening up the medical record for the submission of further medical evidence.

> In this case the judge opened up the medical record at hearing based upon an oral motion by the employee's counsel. He did so finding that the report of Dr. Wolf was inadequate because "the doctor used insufficiently strong language when articulating his causation opinion." [Dec. III, 584.] He suggested that the doctor's expression of his causation opinion in terms of possibilities rather than probabilities makes the report inadequate as a matter of law. . . .
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> . . . That his causation opinion failed to satisfy the employee's burden of proof does not render the report inadequate. The statute does not require and this Board's decisions do not intimate that a medical opinion is "inadequate" simply because it fails to make the employee's prima facie case.

(Insurer br. 5-6.)

The flaw in the insurer's argument, however, is that the report did not provide the judge sufficient information upon which to base his decision in favor of *either* party. "The § 11A opinion must address disability and extent thereof, causal relationship, medical end result, and loss of function as to all disputed medical issues. Where any one of the requirements in 11A(2)(i-iii) are not fulfilled, the § 11A opinion is inadequate as a matter of law." Goodall v. Friendly Ice Cream, 11 Mass. Workers' Comp. Rep. 393, 395 (1997), citing Lebrun v. Century Markets, 9 Mass. Workers' Comp. Rep. 692, 696 & n. 9 (1995); Mendez v. The Foxboro Co., 9 Mass. Workers' Comp. Rep. 641, 646 (1995). Dr. Wolf's use of the term "may", as well as the phrase "at least some" in his causation analysis, falls short of the requirements of § 11A and the judge acted well within his discretion when finding the report inadequate.

We agree with the employee's position that,

> It is "well settled that administrative judges have broad discretion in allowing additional medical evidence due to inadequacies in the Section 11A report…" Hilane v. Adecco Employment Services, 17 Mass. Workers' Comp. Rep. 465 (2003). The judge can open the record "in any case where this additional testimony would serve some legitimate function." O'Brien's Case, 424 Mass. 16, 22 (1996). Moreover, a judge's decision to seek additional evidence is reviewed under an abuse of discretion standard. Hollup's Case, 79 Mass. App. Ct. 1124

> (2011); Coggin v. Massachusetts Parole Board., 42 Mass. App. Ct. 584, 588 (1997).

(Employee br. 3.)

The judge's decision to allow additional medical evidence in this case was not an abuse of his discretion, especially where liability for the back injury had already been established in the first, unappealed decision, and Dr. Wolf's equivocal opinion arguably questioned that initial liability. We further agree with the employee that,

> "Where, as here, the Section 11A report fails to adequately address causal relationship, it is inadequate as a matter of law." [Bean v. Tenavision, 15 Mass. Workers' Comp. Rep. 217, 220-221 (2001)(emphasis added)]. See also Roscoe v. Brigham and Women's Hospital, 28 Mass. Workers' Comp. Rep. 77, 78 (2014) ("An []ambiguous and confusing impartial opinion may not stand alone as the only medical evidence.") The impartial report "should be clear enough that the reader does not come away wondering what the Section 11A doctor meant on central issues, such as causation." Roscoe, id. See also, Brackett v. Modern Continental Const. Co., 19 Mass. Workers' Comp. Rep. 11, 14-15 (2005).

(Employee br. 4.)

Accordingly, the decision of the administrative judge is affirmed. The insurer is directed to pay employee's counsel a fee of $1,705.66, pursuant to G.L. c. 152, § 13A(6).

So ordered.

Martin J. Long
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

Catherine Watson Koziol
Administrative Law Judge

Filed: **August 5, 2020**