COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 064166-93**

Carol McSweeney	Employee
Morton International Inc.	Employer
Morton International Inc.	Self-Insurer

REVIEWING BOARD DECISION
(Judges Levine, Carroll and Maze-Rothstein)

APPEARANCES
Stephen J. Durkin, Esq., for the Employee
Scott E. Richardson, Esq., for the Self-Insurer at hearing
Paul M. Moretti, Esq., for the Self-Insurer on brief

LEVINE, J. The self-insurer appeals from the decision of an administrative judge ordering the self-insurer to pay for a certain surgical procedure and awarding the employee both present § 35 weekly benefits and future § 34 weekly benefits. The future § 34 benefits were for an anticipated incapacity as a result of a future surgical procedure. After review, we affirm in part and reverse in part.

Carol McSweeney, the employee, was fifty-three years old at the time of the hearing. In addition to a high school diploma, she has secretarial and word processing skills. Ms. McSweeney was employed with Morton International as a senior secretary/administrative assistant. Her duties consisted primarily of typing, filing and answering the telephone. (Dec. 3.)

During the course of her employment, Ms. McSweeney's workstation had been altered on several occasions. At some point, she was moved to a smaller workspace that restricted flexibility and movement. She constantly turned her body; she began to complain about pain in various parts of her body. Her employer responded by providing more ergonomically correct furniture. Id.

Eventually, the employee's hand began to bother her. Her supervisors recommended that she seek medical attention. The employee commenced treatment with Dr. William B. Ericson, Jr. Thereafter, the employer downsized its operation. This resulted in increased job duties for the employee. She continued to work with the assistance of splints and cortisone shots. Eventually, in August 1994, her symptoms persisted to the point that she left work due to unbearable bilateral hand pain. Thereafter, Ms. McSweeney underwent three surgeries to her right hand as well as a surgical procedure to her left hand.[1] (Dec. 4.)

The self-insurer initially accepted liability; it subsequently filed a complaint for modification or discontinuance. A § 10A conference order, issued in September 1996, assigned the employee an earning capacity of $200.00 per week. (Dec. 1.) Only the self-insurer appealed to a hearing de novo. At hearing, the employee's motion to join claims for §§ 13, 30 and 34 benefits was allowed.[2] (Dec. 2.)

Pursuant to § 11A, Dr. Hillel D. Skoff, an upper extremity and hand specialist, examined Ms. McSweeney. (Dec. 5.) His report and deposition were admitted into evidence. (Dec. 1.) Because of the complexity of the medical issues, the judge allowed the parties to submit additional medical evidence. (Dec. 2.) The judge gave the parties several months to submit the additional medical

[1] The first surgery to the employee's right hand was a trigger finger release and carpal tunnel release. However, the surgery failed and the employee underwent a second procedure to her right hand in February 1995. Left hand symptoms worsened, and in October 1995, Dr. Ericson did a carpal tunnel release. The third surgery to the employee's right hand was excision of the pisiform. Dr. Ericson later recommended surgery to excise the pisiform on the left wrist. The self-insurer refused to pay for this surgery. (Dec. 4.)

[2] The employee sought treatment for thoracic outlet syndrome and for carpectomy of the left pisiform (wrist). She also sought § 34 benefits following surgery, if the administrative judge ordered the surgery. (Dec. 2.)

evidence. (Dec. 2, 8.) However, only the employee submitted additional medical evidence, the report of her treating physician, Dr. Ericson. (Dec. 1, 8.)[3]

On the question of the reasonableness of further surgery, the judge adopted Dr. Ericson's opinion that the employee's left pisiform should be removed because of the painful work related instability of her hand. (Dec. 10.) The judge therefore ordered the self-insurer to

> pay for the left pisiform surgery. . . . However, given that Employee has had a series of failed surgeries, she would be wise to seek a second opinion as to whether such a surgery at this stage would significantly improve her condition.

(Dec. 10; emphasis in original.) Since the employee did not appeal the conference order assigning her a $200.00 weekly earning capacity, the judge did not order the immediate payment of § 34 benefits. (Dec. 10-11.) Instead, the judge ordered that "if and when [the employee] undergoes surgery to the left pisiform Self-Insurer shall reinstate § 34 temporary total benefits from the date of hospitalization or the date of surgery." (Dec. 11.)

The self-insurer's first argument on appeal is that the judge's decision is contradictory and does not resolve the issue whether the proposed pisiform surgery is reasonable and necessary. The basis for this argument is the judge's suggestion, quoted above, that the employee seek a second opinion before undergoing the surgery. The self-insurer argues that this suggestion shows that the judge herself was uncertain as to the surgery's reasonableness and necessity. We disagree. The judge adopted Dr. Ericson's opinion that the pisiform surgery was appropriate; she did so both in her general findings, (Dec. 10), and in her final order of payment. (Dec. 11.) The fact that the judge, in the circumstances, editorialized in the general findings that the employee seek a second opinion is not contradictory. It is merely

[3] The self-insurer appears to argue that the judge erred by allowing the employee, at hearing, to join a claim for payment of surgery. (Self-insurer bf. 21-23.) The self-insurer alleges that it was prejudiced, Id. at 23, because it could not develop evidence. The judge did not err, cf. 452 Code Mass. Regs. § 1.23(1), in light of her allowing the self-insurer several months to submit relevant medical evidence. (Dec. 2, 8.)

the oft-heard advice to seek a second opinion before undergoing surgery. The question of advisability of surgery is one that requires an expert opinion. See Shand v. Lenox Hotel, 12 Mass. Workers' Comp. Rep. 365, 367 (1998)(where medical issues are beyond the expertise of the fact finder, expert medical testimony is needed). There was such an expert opinion here, which the judge adopted. It then becomes the employee's decision whether actually to undergo surgery. There was no error. Contrast Dos Santos v. Crown Wire & Cable, 9 Mass. Workers' Comp. Rep. 403, 406 (1995)(judge expressed concern regarding the payment for a certain diagnostic test; because the mere expression of concern did not resolve whether the judge considered the payment for the test to be reasonable and necessary, the case was recommitted).

The self-insurer next argues that the judge erred when she ordered the self-insurer to pay Ms. McSweeney § 34 benefits from the date of hospitalization or surgery, should the employee undergo the surgery. (Dec. 11.) We agree that this future order of benefits is error, and we reverse it. The conference order in the case assigned the employee a $200.00 weekly earning capacity and weekly benefits pursuant to § 35. (Dec. 1.) The judge recognized that the employee was content with that order of § 35 benefits, (Dec. 10-11), and did not seek to change it at the de novo hearing. (Dec. 2). The judge had no basis to change it in the uncertain future. "Medical evidence, while not the sole consideration, is obviously crucial to a judge's determination of earning capacity." DiRocco v. Cooley Dickinson Hosp., 12 Mass. Workers' Comp. Rep. 421, 422 (1998). In the present case there was no medical evidence of what the employee's medical disability or its duration would be, if any, should the employee undergo the proposed surgery. "Medical conditions are rarely static," Pagnani v. DeMoulas/ Market Basket, 9 Mass. Workers' Comp. Rep. 4, 5 (1995), and the judge's "[c]onjecture over what may be possible does not amount to probative evidence." DiRocco, supra at 423. Contrast § 10A (2)(b), which authorizes an administrative judge, at conference, where no evidence is taken, to order that weekly benefits "be initiated . . . at a particular date

in the future." Of course, should Ms. McSweeney's medical condition change, for example by her undergoing the surgery, the self-insurer can voluntarily increase her benefits or the employee can file a claim for additional weekly benefits. See G.L. c. 152, § 16.

In conclusion, we affirm so much of the decision that finds the proposed surgery reasonable and work related. We reverse so much of the decision that orders the payment of § 34 benefits in the future. Pursuant to § 13A(6), the self-insurer is ordered to pay the employee's attorney a fee in the amount of $1,218.26.

So ordered.

_____
Frederick E. Levine
Administrative Law Judge

_____
Martine Carroll
Administrative Law Judge

_____
Susan Maze-Rothstein
Administrative Law Judge

FEL/kai
Filed: **October 30, 2000**