COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 002862-05**

Charles La	Employee
Pre-Owned Electronics Co.	Employer
Federal Insurance Company	Insurer

REVIEWING BOARD DECISION
(Judges Horan, Costigan and Fabricant)

The case was heard by Administrative Judge Bean.

APPEARANCES
Robert L. Noa, Esq., for the employee at hearing
Charles E. Berg, Esq., for the employee on appeal
Edward M. Moriarty, Jr., Esq., for the insurer
William C. Harpin, Esq., for the insurer on appeal

HORAN, J. The insurer appeals from a decision awarding the employee § 34 benefits for the psychiatric sequelae of his work-related physical injury. See Cornetta's Case, 68 Mass. App. Ct. 107 (2007). We reverse the decision, vacate the benefit award, and recommit the case for the admission and consideration of additional medical evidence.

On January 7, 2006, on two occasions, the employee's head was struck by boxes at work. (Dec. 805.) Although the employee's orthopedic injuries resolved, he claimed his psychiatric incapacity was related to them. (Dec. 806-807.)

Adopting the opinion of the § 11A impartial medical examiner, Dr. Arnold Robbins, the judge found the employee's psychiatric condition to be causally related to the work injury. (Dec. 810-811.) Following the deposition of Dr. Robbins, the employee moved for leave to introduce additional medical evidence.[1]

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[1] See General Laws c. 152, § 11A(2), which provides, in pertinent part:

> Such impartial physician's report shall constitute prima facie evidence of the matters contained therein. . . .

The judge did not reveal his denial of the motion until he filed the hearing decision.[2] (Dec. 804.)

We agree with the insurer that Dr. Robbins's opinion cannot support the benefit award. However, a recommittal, and not simply a reversal, is in order. This is because the adequacy of Dr. Robbins's causation opinion ebbed and rose with the tide of discontent streaming from the mouths of counsel — with each alternate inquiry spawning a response sufficient to drown the efficacy of its precedent. Samplings from the opinions floated by Dr. Robbins follow.

In his report, Dr. Robbins unequivocally endorsed the causal relationship between the employee's work injuries and his psychiatric disability. (Ex. 4; Dec. 808.) At his deposition, asked to address his initial affirmative response to the causal relationship question, the doctor testified: "[I]t shouldn't have been so affirmative with a period after 'Yes.' I should have said, yes, possibly." (Dep. 26.) Later, when asked if he abided by the findings and conclusions of his report, the doctor replied: "You know, with the preponderance of the evidence it's more likely than not, which isn't great, but yes." (Dep. 44-45.) Asked whether the employee's "industrial accident more likely than not is causally related to [his] current disability," the doctor answered: "Yes, I'd say." (Dep. 57.) Questioned

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> Notwithstanding any general or special law to the contrary, no additional medical reports or depositions of any physicians shall be allowed by right to any party; provided, however, that the administrative judge may, on his own initiative or upon a motion by a party, authorize the submission of additional medical testimony when such judge finds that said testimony is required due to the complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner.

[2] Because, in many cases, this practice constitutes a due process violation, it is best avoided. See Guzman v. ACT Abatement Corp., 23 Mass. Workers' Comp. Rep. 291 (2009); Babbitt v. Youville Hosp., 23 Mass. Workers' Comp. Rep. 215 (2009); Godinez v. Perkins Paper Co., Inc., 22 Mass. Workers' Comp. Rep. 83 (2008); Mayo v. Save On Wall Co., 19 Mass. Workers' Comp. Rep. 1 (2005); Dunn v. U. S. Art Co., 18 Mass. Workers' Comp. Rep. 123 (2004).

further by insurer's counsel, the doctor repeated his prior opinion that the employee's psychiatric disability was only possibly related to his industrial accident. (Dep. 61.) Conceding the employee could have been emotionally predisposed to the onset of his psychiatric condition, the doctor testified he did not know if this was the case, but that is was possible. (Dep. 60-61.)

The doctor's change of mind here was not based on any new foundational material being made available to him. Thus, the rule in Perangelo's Case, 277 Mass, 59, 63-64 (1931)(last opinion expressed governs when based on new evidence), does not apply. His repeated contradictions addressing the causation issue cannot constitute prima facie evidence. We have addressed this situation previously. In Brooks v. Labor Mgmt. Srvs., 11 Mass. Workers' Comp. Rep. 575 (1997), we stated:

> The unexplained, internally inconsistent opinion of the §11A physician in the present case cannot be accorded prima facie force under the Cook [v. Farm Service Stores, Inc, 301 Mass. 564 (1938)] reasoning. It should therefore "retain only its inherent persuasive weight as a piece of evidence *to be considered with other evidence. . . .*" Cook, Id. at 566 (emphasis added). It logically follows that additional medical evidence is mandated under the circumstances presented by this case. The impartial physician's opinion evidence is inadequate because it is too self-contradictory to "[compel] the conclusion that the evidence is true. . . ." Id. As a practical matter, if the evidence cannot stand alone as prima facie, it cannot be exclusive. § 11A.

Brooks, supra at 580. See Nunes v. Town of Edgartown, 19 Mass. Workers' Comp. Rep. 279, 284-285 (2005)(where impartial physician expresses two irreconcilable opinions, neither can be accorded prima facie weight). Recently, in affirming our decision in Orlofski v. Town of Wales, 23 Mass. Workers' Comp. Rep. 175 (2009), the Appeals Court noted an administrative judge "cannot, where an [impartial medical examiner's] testimony is self-contradictory, select which of the contradictory testimony to credit. The board properly found that such evidence fails to give rise to prima facie evidence of the matters contained therein,

mandated by G. L. c. 152, § 11A(2)." Orlofski's Case, 76 Mass. App. Ct. 1133 (2010)(memorandum and order pursuant to rule 1:28).

The present case is governed by the foregoing precedent. Because, unlike the employee in Orlofski,[3] the employee here *did* move to introduce additional medical evidence, we recommit the case for the admission and consideration of such evidence.

Accordingly, we reverse the decision, vacate the benefit award, and recommit the case to the administrative judge for a decision anew.

So ordered.

Mark D. Horan
Administrative Law Judge

Patricia A. Costigan
Administrative Law Judge

Bernard W. Fabricant
Administrative Law Judge

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[3] "The board need not recommit the case to the AJ to open the record for additional medical evidence where the employee failed to move for the admission of additional medical evidence to supplement the record. The claimant, not the AJ, has the burden of moving to expand the medical record where the report of the [impartial medical examiner] is inadequate. Viveiros's Case, 53 Mass. App. Ct. 296, 299-300 (2001)." Orlofski's Case, supra.