**COMMONWEALTH OF MASSACHUSETTS**

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| **DEPARTMENT OF INDUSTRIAL ACCIDENTS** | **BOARD NOS. 033305-91 035651-98 001816-04** |
| Cynthia Bell | Employee |
| Massachusetts Bay Transportation Authy. | Employer |
| Massachusetts Bay Transportation Authy. | Self-insurer |

**REVIEWING BOARD DECISION**
(Judges Koziol, Costigan and Horan)

The case was heard by Administrative Judge Lewenberg.

**APPEARANCES**
Daniel P. Napolitano, Esq., for the employee
John C. White, Esq., for the self-insurer at hearing and on appeal
Richard W. Jensen, Esq., for the self-insurer on appeal

**KOZIOL, J.** The self-insurer appeals from a decision awarding the employee § 34A permanent and total incapacity benefits as a result of her disability stemming from bilateral knee injuries, a right shoulder injury, and right carpal tunnel syndrome, and §§ 13 and 30 benefits for a right total knee replacement. The self-insurer raises one issue on appeal, arguing the judge erred in denying its request to take the deposition of the employee's former treating physician, Dr. Jeffrey L. Zilberfarb. We agree that recommittal is required to allow the judge to exercise his discretion under 452 Code Mass. Regs. § 1.12(5)(a).

The employee, who is right hand dominant and was fifty-eight years old at the time of the hearing, sustained a series of accepted work-related injuries. On January 8, 1991, the employee injured her left knee and underwent arthroscopic surgery for a torn meniscus; on September 8, 1998, she injured both knees and required arthroscopic surgery to her left knee; and, on January 28, 2004, she injured her left knee, right shoulder and right hand. (Dec. 5-6.) As a result of her work-related right shoulder injury, the employee has had a total of three arthroscopic shoulder surgeries. Following her second shoulder surgery, the employee returned to work for the self-

insurer in a light duty capacity as a toll collector, sitting in a booth selling tokens, making change, and recording receipts. (Dec. 6.) The employee began to experience increased shoulder pain and pins and needles sensations in her right hand; as a result, she stopped working on June 5, 2006, and has not worked since. (Dec. 6.) She underwent her third shoulder surgery on December 6, 2006. (Dec. 6.)

In his October 12, 2007, hearing decision, the judge ordered the self-insurer to pay the employee § 34 benefits from June 6, 2006 and continuing.[1] (Ex. 9 at 8.) The employee filed the present claim on October 23, 2007, seeking § 34A benefits and medical benefits from September 25, 2007 to date and continuing. Following a §10A conference, the judge ordered the self-insurer to pay the employee § 34A benefits. He also ordered the self-insurer to pay §§ 13 and 30 benefits for a right carpal tunnel release required as a result of the 2004 injury, as well as for the knee injuries of 1998 and 1991. The self-insurer appealed and on May 27, 2008, the employee was examined by a § 11A impartial medical examiner, Dr. Olarewaju James Oladipo.

The hearing took place over the course of two days.[2] The self-insurer moved to submit additional medical evidence for the time period prior to the impartial medical examination, and requested permission to take the deposition of the employee's former treating physician, Dr. Zilberfarb, whose reports were not offered by the employee at conference and were not forwarded to the impartial medical examiner. (Tr. I, 5.) The judge found the impartial medical report to be inadequate and allowed the parties to submit additional medical evidence.[3] (Tr. I, 10.) He

[1] That decision was based on the adopted opinions of a § 11A impartial medical examiner, Dr. Robert Leffert, and Dr. Zilberfarb's opinions regarding the extent of the employee's disability during the gap period prior to Dr. Leffert's March 7, 2007 examination. The judge also adopted Dr. Zilberfarb's opinion that the employee required the third shoulder surgery, which he had performed. (Ex. 9 at 6, 8; Dec. II, 7.)

[2] References to the transcripts of those hearings are March 20, 2009 (Tr. I) and April 30, 2009 (Tr. II).

[3] The self-insurer appears to have contemplated offering Dr. Zilberfarb's reports in evidence at the hearing, but it did not pursue that course of action, choosing instead to request

requested briefs from the parties regarding the insurer's request to take Dr. Zilberfarb's deposition. Id.

After reviewing the parties' briefs, (Exs. 10, 11), the judge heard argument from, and asked questions of, the parties regarding the nature and extent of Dr. Zilberfarb's treatment of the employee and the self-insurer's reasons for requesting permission to take the doctor's deposition. (Tr. II, 3-6.) Employee's counsel stated that from the summer of 2004 through August of 2007, Dr. Zilberfarb was the employee's treating physician; he performed all three of her shoulder surgeries; and he last examined the employee on August 2, 2007. (Tr. II, 3-4.) The following exchange then took place:

> The Judge: At some point did you retain Dr. Zilberfarb after that for expert testimony of any kind?
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> Mr. Napolitano: I did write to Dr. Zilberfarb on several occasions with regard -- after the August visit, for updated medical records and a report with regard to the issue of disability and extent of disability.

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permission to take the doctor's deposition. The record shows the judge properly did not foreclose the self-insurer from attempting to admit those reports:

> Mr. White: And then should, should then not Dr. Zilberfarb's opinions, from January and again in February of 2008, be submitted as well wherein he comments on the issue of causation and disability.
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> The Judge: You have the right to submit any evidence that is not objectionable. So if the brief [sic] chooses not to submit those records and you chose [sic] to, if there is a way for you to submit them, you know, appropriately put them into evidence, then you may do. The employee has a right to object and give me their [sic] basis for their [sic] objection, and I'll make a ruling on that.

(Tr. I, 12.) See Higgins's Case, 460 Mass. 50, 62 & n.16 (2011)("Medical reports in general are 'independently admissible' at department hearings pursuant to G.L. c. 233, § 79G"). Nonetheless, the record shows the self-insurer never attempted to admit Dr. Zilberfarb's records in evidence; accordingly, the judge made no ruling on its ability to do so. As such, the self-insurer failed to preserve the issue of the admissibility of the reports for appellate review and we decline the self-insurer's request that it be allowed to admit the reports on recommittal. (Self-ins. br. 15-16.)

The Judge: And did you receive those?

Mr. Napolitano: He provided -- I believe it was a report in December and then a two-page – a two-sentence line faxed to my secretary. I believe it was sometime in January of 2008, addressing the issue of disability, without the benefit of seeing my client since August of 2007.

(Tr. II, 4.) Self-insurer's counsel stated that Dr. Zilberfarb wrote two reports to employee's counsel, dated January 17, 2008 and February 4, 2008, which were not provided to the impartial medical examiner. Self-insurer's counsel made an offer of proof claiming those reports contradicted the medical reports of other physicians that were submitted by the employee at conference, insofar as Dr. Zilberfarb opined that the employee's right knee condition was not causally related to her industrial injuries and she "had no restrictions with regard to her right shoulder."[4] (Tr. II, 5-6.) The judge then made the following ruling:

> I'm going to find that the [sic] Dr. Zilberfarb's reports in '08 which are a good seven or a good six months after he saw the employee were in response to the employee's request for expert medical testimony. And therefore, pursuant to the regulations do fall within the bounds of the case cited by employee counsel. Which is Collin [sic] v. Kitty's Restaurant and Lounge. And I am going to deny the motion to depose Dr. Zilberfarb on those matters since the employee had not chosen to submit these reports into evidence.

[4] At the time of its original request, self insurer's counsel stated:

> I would suggest that the rights of the self-insurer would be severely prejudice [sic] if they [sic] were not afforded the opportunity to take the deposition of Dr. Zilberfarb who at the time he rendered his opinions was the employee's treating physician, and who at that time had intermittent [sic] knowledge of the employee's then current medical condition, and would be able to render an opinion with regards to her then disability and her issues of causation.

(Tr. I, 6.) After pointing out the alleged discrepancies between Dr. Zilberfarb's opinions expressed in his reports, and the opinions of other doctors whose reports the employee later admitted in evidence at hearing, (Exs. 6, 7), self-insurer's counsel stated, "I'd like to get more of Dr. Zilberfarb's, on the basis of his opinions, [sic] in my deposition." (Tr. II, 6.)

(Tr. II, 6.)[5]

The judge's ruling shines light on an error in our decision in Colon v. Kitty's Restaurant and Lounge, 14 Mass. Workers' Comp. Rep. 67, 68 (2000). There, the employee sought to admit into evidence the report of the insurer's § 45 medical examiner, Dr. Bianchi. Relying on 452 Code Mass. Regs. § 1.11(6), the judge refused to accept the report, and also denied the employee's request to take Dr. Bianchi's testimony by deposition. Colon, supra at 68. In affirming the judge's actions, we stated:

> The regulation cited by the judge reads in pertinent part as follows:
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> > At a hearing pursuant to M.G.L. c. 152, § 11 . . . in which the administrative judge has made a finding . . . that additional testimony is required due to the complexity of the medical issues . . . a party may offer as evidence medical reports prepared by physicians *engaged by said party*, together with a statement of said physician's qualifications. (emphasis added).
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> 452 Code Mass Regs 1.11(6)(c) [sic].
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> The employee offered the report pursuant to this regulation. However, it creates a hearsay exception allowing the introduction of one's *own* medical experts. As Dr. Bianchi was engaged by the insurer, the judge did not err in relying upon the above-cited regulation in refusing the offer of his report. Based on another regulation, the judge refused the employee's request to depose Dr. Bianchi. "Pursuant to 452 C.M.R. 1.12(5), any party may, for the purpose of cross-examination, depose the physician who prepared an *admitted medical report*." (Dec. 3, 4, emphasis added). If there are other possible bases which would have made the report or deposition of Dr. Bianchi admissible on behalf of the employee, they have not been argued; thus we affirm the judge's disposition on this issue. Cf. Ramacorti v. B.R.A., 341 Mass. 377 (1960) (discussing circumstances under which one party can use the expert hired by the opposing party).

Colon, supra at 69-70.

[5] The judge properly allowed the self-insurer to use Dr. Zilberfarb's reports in cross-examining the impartial medical examiner. Higgins, supra at 62-63.

Since 1993, the pertinent provisions of both §§ 1.11(6) and 1.12(5), remain unaltered.[6] Although Colon states the judge's denial of the employee's request to take Dr. Bianchi's deposition was "[b]ased on another regulation," the decision actually references the language appearing in § 1.11(6)(c), which is also cited as the ground supporting the judge's refusal to admit Dr. Bianchi's report. As a result, the decision erroneously implies that § 1.12(5) limits the exercise of the judge's discretion to allow the deposition testimony of only those physicians who author admitted medical reports. While § 1.12(5)(a) requires a judge to allow a party's

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[6] 452 Code Mass. Regs. § 1.11(6)(1993) states, in pertinent part:

> At a hearing pursuant to M.G.L. c. 152, § 11 . . . in which the administrative judge has made a finding under M.G.L. c. 152, § 11A(2) that additional testimony is required due to the complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner, a party may offer as evidence medical reports prepared by physicians engaged by said party, together with a statement of said physician's qualifications. The administrative judge may admit such medical report as if the physician so testified, provided that where specific facts are in controversy, the administrative judge shall, on motion by a party, strike any part of such report that is not based on:
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> . . .
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> (c) evidence which the parties represent will be presented during the course of the hearing. Pursuant to 452 CMR 1.12(5), any party may, for the purpose of cross-examination, depose the physician who prepared an admitted medical report. After such cross examination, the parties may conduct further examination pursuant to the rules of evidence applied in courts of the Commonwealth.

452 Code Mass. Regs. § 1.12(5)(a)(1993) states, in pertinent part:

> At a hearing pursuant to M.G.L. c. 152, § 11 . . . in which the administrative judge has made a finding under M.G.L. c. 152, § 11A(2) that additional testimony is required due to the complexity of the medical issues involved or the inadequacy of the report submitted by the impartial medical examiner, an administrative judge may authorize the taking of testimony of medical witnesses by deposition. An administrative judge shall authorize the testimony by deposition of the impartial physician. . . . *In addition to the impartial physician's deposition, an administrative judge may authorize the submission of medical testimony by deposition on motion by a party or on the judge's own initiative.*

(Emphasis added.)

request to take an impartial medical examiner's deposition, it gives the judge discretion, without imposing additional limits on that discretion, to allow the parties to take the depositions of other doctors.[7] On this record it is not clear that the judge realized he had authority under § 1.12(5)(a) to exercise his discretion in this case. See Praetz v. Factory Mut'l Eng'g & Research, 7 Mass. Workers' Comp. Rep. 45, 47 (1993) (recommittal appropriate where reviewing board cannot "determine with reasonable certainty whether correct rules of law have been applied to the facts that could be properly found").

Accordingly, we recommit the matter for the judge to exercise his discretion under 452 Code Mass. Regs. § 1.12(5). In doing so, the judge must make additional findings, and if need be, he may make further findings of fact and rulings of law pertaining to the employee's § 34A claim.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Patricia A. Costigan
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

Filed: ***August 25, 2011***

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[7] To be clear, § 1.11(6) concerns only the deposition testimony of doctors who prepare *admitted* medical reports providing for that testimony for the purpose of *cross-examination*, whereas § 1.12(5)(a) concerns *the taking of medical testimony by deposition*, with no other limitation.