COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 028432-99**

Dale D. Crandall, Jr.	Employee
ELAD General Contractors	Employer
Ace Property & Casualty Ins.	Insurer

REVIEWING BOARD DECISION
(Judges Carroll, Levine and Wilson)

APPEARANCES
Robert N. Wilson, Jr., Esq., for the employee
William R. Maher, Esq., for the insurer

CARROLL, J. The insurer appeals an administrative judge's award of a closed period of § 34 temporary total incapacity benefits and ongoing § 35 partial incapacity benefits, alleging that the judge made several errors. We recommit the judge's decision based on three issues raised by the insurer. The insurer argues that the judge erred by finding the employee totally incapacitated during a period when there was no medical evidence supporting such a finding, and by failing to perform an adequate analysis under G. L. c. 152, § 35D. We agree with the insurer on both points. The insurer also contends that the judge erred by not allowing the insurer to show the § 11A doctor surveillance videotape that had been admitted as evidence. Though we do not agree that due process always requires the judge to allow an insurer to show videotapes to the § 11A doctor, we do agree that the judge did not adequately explain why she did not allow the impartial physician to view them. Without a sufficient explanation we cannot perform our appellate function. We therefore recommit the case for the admission of additional medical evidence, for further analysis under § 35D, and for further explanation as to her ruling denying the insurer the opportunity to cross-examine a witness with the actual admitted exhibit. We summarily affirm the decision as to all other issues raised by the insurer.

The employee, Dale Crandall, age thirty-nine at the time of hearing, has a bachelor's degree in business from Plymouth State College. Since 1983 he had been a working supervisor and part owner of the employer corporation, a residential and commercial construction company. On April 20, 1999, the employee fell and injured his left knee while doing a roofing job. He took the next day off, but returned to light duty and supervisory work. On August 4, 1999, he underwent arthroscopic surgery on his left knee. He tried to return to work as soon as possible. (Dec. 3.)

The insurer paid § 34 weekly temporary total incapacity benefits without prejudice from July 12, 1999 to July 25, 1999. The employee's claim for further benefits was heard at conference, after which the judge ordered the insurer to pay § 34 benefits from the date of injury until November 30, 1999. Both parties appealed to a hearing de novo. (Dec. 2.)

Prior to the hearing, the employee was examined by a physician appointed pursuant to § 11A. (Dec. 3.) His report and the deposition testimony were admitted into evidence. (Dec. 2.) The doctor opined that Crandall injured his knee at work and diagnosed him with a torn medial meniscus, a partial tear of the medial collateral ligament, and continued synovitis of the left knee. As of January 11, 2000, the date of the § 11A examination, the doctor found the employee to be temporarily partially disabled and " 'capable of a light sedentary position with no stairs or ladders . . . .' " (Dec. 3-4.)

The judge found the report of the § 11A medical examiner to be adequate and the medical issues not complex. No other medical evidence was offered or admitted to prove incapacity or causal relationship, but there were a number of medical notes and records admitted for identification or impeachment purposes only. (Dec. 1-2, 4, 5.) The judge noted some inconsistencies in the treating doctor's notes, particularly with respect to how the accident occurred, but nevertheless found it "more likely than not" that the employee injured his knee at work on April 20, 1999. (Dec. 4.) The insurer also offered four surveillance videotapes that the judge admitted into evidence. (Dec. 2.) The judge found that the § 11A physician's opinion was prima facie evidence of the employee's medical condition, but recognized that she need not accept his non-medical conclusions. (Dec. 5.)

She went on to award the employee § 34 temporary total incapacity benefits from April 21, 1999 to January 11, 2000, the date of the § 11A examination, "subject to adjustment for any wages actually earned in that period." (Dec. 6.) She further awarded him ongoing § 35 partial incapacity benefits beginning January 12, 2000, with an earning capacity based upon his actual earnings. Id.

The insurer appeals, raising a number of issues, three of which have merit. First, the insurer argues that there was no medical evidence to support a finding of total incapacity prior to the date of the § 11A examination on January 11, 2000. We agree. The § 11A physician's report and deposition were the only medical evidence admitted, and thus had prima facie effect. (Dec. 1-2, 5.) The doctor testified at deposition that: "*As of January 2000 when I examined him*, he was capable of a light sedentary position with no stairs and ladders, that is primarily a sitting job." (Dep. 15, emphasis added.) This opinion does not address the extent of the employee's disability prior to the date of the examination. In a case such as this, the § 11A examiner's opinion simply does not provide the judge with enough medical evidence on which to ground an appropriate incapacity analysis.

A judge is not generally competent to fill the medical evidentiary gap on her own based only on non-medical evidence. Bellanton v. The Flatley Co., 11 Mass. Workers' Comp. Rep. 617, 618-619 (1997). "[W]here the administrative judge is faced with an inadequate [impartial] report and an employee's claim that the judge believes to be meritorious, the judge is empowered to authorize further medical evidence sua sponte, even though neither party has requested it, [which is the case here] rather than rely on the judge's own lay medical opinion." Viveiros's Case, 53 Mass. App. Ct. 296, 299-300, n.6 (2001). See also Allie v. Quincy Hosp., 12 Mass. Workers' Comp. Rep. 167, 170 (1998); Wilkinson v. City of Peabody, 11 Mass. Workers' Comp. Rep. 263, 265 (1997). Accordingly, we recommit this case for the admission of additional medical evidence during the gap period between April 20, 1999, and January 11, 2000, and for further findings on the extent of the employee's incapacity during that time.

The judge correctly points out that the medical evidence is but one factor she must consider in making her incapacity determination. She must also consider how the employee's age, education, training, work experience, and other non-medical factors affect his ability to earn wages. See Scheffler's Case, 419 Mass. 251, 256 (1994). Though the judge acknowledged these vocational factors, she did not actually perform an incapacity analysis for the period for which she awarded total incapacity benefits. As often noted, a determination of incapacity for work "involves both a medical evaluation of the employee's physical impairment and an economic assessment of how that impairment affects the employee's ability to earn wages." Thompson v. Tom Hague III Builders, 12 Mass. Workers' Comp. Rep. 303, 305 (1998). We should be able to look at the subsidiary findings of fact and clearly understand the logic behind the judge's ultimate conclusion as to incapacity. Crowell v. New Penn Motor Express, 7 Mass. Workers' Comp. Rep. 3, 4 (1993). We are unable to do that in this case. On recommittal, the judge should make additional subsidiary findings not only on the employee's physical limitations caused by his medical condition but also on how relevant vocational factors affect his ability to earn wages during the period up to January 12, 2000.

The insurer also argues that a finding of total incapacity is precluded by the fact that the employee testified to having worked some during the April 1999 to January 2000 period. The insurer cites Whalen v. Resource Mgt., 11 Mass. Workers' Comp. Rep. 294 (1997), in support of its position. In Whalen, the employee testified that he looked for employment at about thirty different places and that he had earned seventy-five dollars a week answering the telephone at a pizza shop. The reviewing board held that, "While no evidence was presented as to how many weeks Mr. Whalen worked, it is clear that the evidence does not support a finding of total incapacity *for any week he in fact worked*." Id. at 295-296. (Emphasis added.)

Here, the judge awarded § 34 benefits "subject to adjustment for any wages actually earned in that period." (Dec. 6.) Thus, our decision in Whalen does not preclude an award of § 34 benefits for weeks in which the employee did not work, even where the

employee has performed some work during the claimed period of total incapacity. The judge found that, after the industrial accident, "[t]he employee returned to work, but performed only light duty and supervisory work." (Dec. 3.) The insurer points out that the employee testified that he made at least ten attempts to return to work, (Tr. 32, dated May 2, 2000) (hereinafter "Tr. I"), worked six or eight hours on October 6, 1999, (Tr. I, 70), and participated in every roofing operation since October 1999 at a housing development, including climbing ladders, unloading equipment, and assisting in the shingling of roofs. (Tr. I, 76, 77.) On recommittal, if the judge still finds the employee totally incapacitated for some periods of time, she should reconcile that award with the employee's testimony and her finding that he returned to work in a supervisory/light duty capacity.

On a related note, the insurer argues that the administrative judge failed to perform an adequate analysis under § 35D in setting the employee's earning capacity after January 11, 2000. Section 35D requires, in pertinent part, that the employee's earning capacity shall be the *greatest of:* "(1) The actual earnings of the employee during each week," or: "(4) The earnings that the employee is capable of earning." (Emphasis added.)

In awarding the employee partial incapacity benefits after January 11, 2000, the judge found that "the employee has actual earnings to demonstrate his earning capacity." (Dec. 5.) There are no findings to indicate that she considered whether this relatively young employee with a bachelor's degree in business and experience in supervisory work was capable of earning more than he was actually earning. Therefore, on recommittal, the judge should make subsidiary findings regarding the amount the employee is capable of earning "with a reasonable use of all his faculties, mental and physical." France v. Door Eng'g Co. & Servs. Unltd., 12 Mass. Workers' Comp. Rep. 142, 145 (1998). If such amount is greater than the employee's actual earnings, that amount should be used to calculate his earning capacity.

Finally, the insurer argues that the judge erred as a matter of law by denying the insurer the opportunity to show surveillance videotapes, admitted into evidence, to the

§ 11A doctor. The insurer argues that its due process rights were violated because it was denied the right to thoroughly cross-examine the § 11A physician and thereby attack the foundation of his medical opinion.[1] The insurer points out that the administrative judge made no findings in her decision regarding the relevance of the videotapes or the testimony of the investigator. (Insurer brief, 7-8.)

Although we do not agree that the fundamental requirements of due process mandate the judge in all cases to allow the insurer to show the videotapes to the §11A physician, we do agree that the judge must have an appropriate reason for not allowing the § 11A physician to view an actual exhibit. Accordingly, this issue must be revisited. On recommittal, the judge must make sufficient explanation as to her ruling against submission of the videotapes to enable proper appellate review.

Due process entitles parties to a hearing at which they have an opportunity to present evidence, to examine their own witnesses, to cross-examine witnesses of other parties, to know what evidence is presented against them and have an opportunity to rebut it, as well as to develop a record for meaningful appellate review. Haley's Case, 356 Mass. 678, 681-682 (1972). However, an administrative judge does have broad discretion, and indeed an obligation to control the conduct of hearings as well as related proceedings, including depositions. Saez v. Raytheon Corp., 7 Mass. Workers' Comp. Rep. 20, 22 (1993). But, judicial discretion to conduct and control proceedings is not unbridled and is subject to appellate review. Ackroyd's Case, 340 Mass. 214, 218-219 (1960). And relevant and the best evidence should not as a rule be kept from an expert witness who may express an opinion based on that evidence. Hence, we look to the judge's explanation.

[1] In the alternative, the insurer argues that the judge's denial of its request to show the videotapes to the impartial physician was prejudicial error. Though the insurer acknowledges that the videotapes were admitted into evidence, its argument nevertheless seems to be premised on the assumption that the videotape was erroneously excluded. (Insurer Brief 9-10.) Since there was no erroneous exclusion of evidence, the cases cited by the insurer are inapposite.

A review of the transcript reveals the following discussion between the insurer and the judge:

> MR. MAHER: The only problem, Judge, I'm going to have more video to go in that the doctor would be entitled to look at.
>
> THE JUDGE: **We don't show videos to the doctor.** We ask hypothetical questions.
>
> MR. MAHER: I understand.
>
> THE JUDGE: That's what we do. We show videos to the Judge. You can frame hypothetical questions based on what I saw today.
>
> MR. MAHER: My skills—I'm not so good as what the video, by then it's a ten minute, edited would show and demonstrate.
>
> THE JUDGE: That is always a problem. **I do not let people take videos to depos.** Let them ask whatever questions they want to ask. That's what it's for. **I don't show videos.** I have no control.
>
> MR. MAHER: I do object to that.

(Tr. I, 100-101.)

> THE JUDGE: **My practice is not to do that.**

(Tr. I, 102.) (Emphasis added.)

The judge's position is misplaced. In Peroulakis v. Stop & Shop, 12 Mass. Workers' Comp. Rep. 93 (1998), we held that it is perfectly permissible to place surveillance videos alongside medical records, oral history, medical tests and results of examination(s) as the medical expert works toward reaching an opinion on causal relationship and medical disability.

Once the videotapes were admitted into evidence, generally a witness should be able to look at the original exhibit. Where the judge denies the request to cross-examine the § 11A doctor by showing videotapes which are in evidence with an explanation that it is simply not her practice to do so, (Tr. I, 102), that denial is an abuse of discretion. Further explanation is needed to determine whether the judge had justifiable reasons for excluding the videotapes from being used on cross-examination. Therefore, the matter is returned to the judge to give adequate explanation for excluding the videotape evidence from the §11A doctor or to allow the insurer to display the videotapes to the doctor.[2]

Accordingly, we recommit the case for the admission of additional medical evidence, for further analysis under § 35D, and for further action or explanation as to her ruling on the submission of the videotapes to the § 11A physician.

So ordered.

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Martine Carroll
Administrative Law Judge

_____
Frederick E. Levine
Administrative Law Judge

Filed: **February 8, 2002**
MC/jdm

_____
Sara Holmes Wilson
Administrative Law Judge

[2] The judge may in her discretion set reasonable limits on the length of the tapes if she determines they are too lengthy and editing can be accomplished without distorting the evidence.