COMMONWEALTH OF MASSACHUSETTS

DEPARTMENT OF INDUSTRIAL ACCIDENTS **BOARD NO. 009011-08**

Daniel Spadola	Employee
TGI Fridays	Employer
Indemnity Insurance Co. of North America	Insurer

REVIEWING BOARD DECISION
(Judges Koziol, Horan and Fabricant)

The case was heard by Administrative Judge Rose.

APPEARANCES
Paul G. LaLonde, Esq., for the employee
John F. Burke, Esq., for the insurer
Carey H. Smith, Esq., for the insurer on appeal

KOZIOL, J. The insurer appeals from a decision awarding the employee § 34A permanent and total incapacity benefits as a result of his March 22, 2008, industrial accident. Because one of the insurer's two alleged claims of error is meritorious, we recommit the matter for further findings of fact.

This is the second hearing decision issued in this case.[1] In the first decision, a different administrative judge ordered the insurer to pay the employee § 34 temporary total incapacity benefits as a result of injuries he sustained when he slipped and fell at work, striking his head and neck on a counter, and then the floor. (Dec. I, 2.) The employee subsequently filed the present claim, seeking § 34A benefits from June 30, 2010, and continuing. After a § 10A conference, the judge awarded the employee § 34A benefits commencing August 1, 2010. (Dec. II, 1, 2.) Both parties appealed and the employee was examined by a § 11A impartial medical examiner, Dr. Samuel Brendler, who also served as the § 11A

[1] The first judge's decision, filed May 21, 2010, and hereinafter referred to as Dec. I, ordered payment of § 34 temporary total incapacity benefits and ruled that the employee's claim for § 34A benefits was premature "until the prospect of further surgery is fully explored and either undergone or ruled out." (Dec. I, 4.) We refer to the second judge's decision, which gave rise to the present appeal, as Dec. II.

physician in the earlier litigation. Dr. Brendler diagnosed the employee as having "traumatic cervical myelopathy, status post posterior discectomy, C6-7, right (1994), status post anterior discectomy, C5-6 and C6-7 with fusion (1996), and status post anterior discectomy, C4-5 with fusion and plating (2008)." (Dec. II, 4.) The judge adopted Dr. Brendler's opinions regarding the employee's diagnoses as well as his opinion causally relating the employee's ongoing disability and need for medical treatment to the March 22, 2008, work injury. Id. The judge credited the employee's complaints of continuing pain in his neck, upper back and shoulders, with radiating pain, numbness and tingling into his arms and hands, and episodic spasms in his arms. (Dec. II, 3.) The judge allowed the insurer's motion for additional medical evidence, finding Dr. Brendler's report to be inadequate. (Dec. II, 2.) At his subsequent deposition, Dr. Brendler recommended that a Functional Capacity Evaluation (FCE) be performed prior to the employee making any attempt to return to work. (Dec. II, 4.)

The parties agree that after Dr. Brendler's deposition, they discussed the matter of the FCE and the insurer agreed to pay for the evaluation. However, the parties are completely at odds with each other as to how the FCE report would be handled at hearing: the employee states the insurer agreed the FCE would be submitted to the judge as evidence and the insurer states it never made any such agreement with the employee. The FCE was performed on August 30, 2011, and on September 7, 2011, the employee submitted it as part of, and included with, the office records of the employee's treating neurologist, Dr. Natasha McKay. The insurer objected to the admission of the FCE; and a status conference, off the record, was conducted on September 15, 2011. (Ins. br. 4-5; Employee br. 9-10.) The record closed on September 17, 2011.

The judge adopted Dr. Brendler's opinions on diagnoses and causal relationship, and Dr. McKay's permanent and total disability opinions dated June 30, 2010 and July 11, 2011. (Dec. II, 4, 5.) The judge also adopted the findings reported in the FCE. (Dec. II, 4.) The judge concluded the employee was

permanently and totally incapacitated as of June 30, 2010, the date of Dr. McKay's medical report stating as much. (Dec. II, 5.)

The insurer's first claim of error is that its due process rights were violated when the judge, who sustained its objection to three medical records offered as exhibits at Dr. Brendler's deposition, later "rel[ied] on those excluded records" in his decision.[2] (Ins. br. 2, 5-6, 7.) The three records complained of are: a March 11, 2011, MRI report; a July 5, 2011, Cooley Dickinson Hospital Rehabilitation Services Status Summary; and, a July 11, 2011, note from Dr. McKay. (Ins. br. 5-6; Dep. 13, 24, 29.) The insurer's argument is without merit.

The argument is based on the premise that by offering the records as exhibits at a deposition, the employee was somehow "attempting to introduce [the records] into evidence." (Ins. br. 2, 5, 7.) Medical records submitted at an impartial physician's deposition do not become evidence in the record merely because they are marked as exhibits. See Morini v. Wood Ventures, Inc., 17 Mass. Workers' Comp. Rep. 426, 432 (2003)(doctor's medical opinions not made part of evidence before judge simply because they were marked as exhibits at impartial examiner's deposition); Cowan v. Springfield Assoc., Inc., 9 Mass. Workers' Comp. Rep. 503, 505 n. 6 (1995)("marking of exhibits for identification in a deposition . . . does not in itself transform the documents into evidence"). In any event, to the extent the judge sustained the insurer's objections to marking the documents as "exhibits," his ruling was unnecessary, as exhibits marked "for identification" are not evidence and may not be treated as such.[3] See Commonwealth v. O'Neil, 51 Mass. App. Ct. 170, 177 n.7 (2001).

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[2] At Dr. Brendler's deposition, the employee submitted each record as an exhibit, which was marked for identification, over the insurer's objection. In his decision, the judge sustained the objection made at deposition. (Dec. II, 7.)

[3] As the court has explained in Higgins's Case, 460 Mass. 50, 60 n.14 (2011):

> [M]edical records and reports submitted to the impartial physician may be brought into the record through their consideration by the impartial physician or

Moreover, the decision shows that only one of these records was relied on by the judge, Dr. McKay's July 11, 2011, note.[4] (Dec. II, 5.) The insurer's brief fails to mention the critical fact that Dr. McKay's office records, which included the note of July 11, 2011, were duly admitted in evidence.[5] (Employee Ex. 1.) On September 8, 2011, by electronic mail, the insurer objected to admission of only the FCE: it did not object to any other evidence offered and expressly acknowledged it had no objection to the admission of Dr. McKay's records. Rizzo v. M.B.T.A., 16 Mass. Workers' Comp. Rep. 160, 161 n. 3 (2002)(we take judicial notice of the documents in the board file). Thus, the insurer waived its right to challenge the admission of that additional medical evidence on appeal. Commonwealth v. Haley, 363 Mass. 513, 517 (1973)(and cases cited)("Failure to object to offered evidence operates to waive objections to its admissibility"); Green v. Town of Brookline, 53 Mass. App. Ct. 120, 128 (2001)(objections not raised below are deemed waived on appeal); Smith v. Northeastern University, 24 Mass. Workers' Comp. Rep. 229, 231 (2010)(failure to object to introduction of medical report at hearing is waiver). Accordingly, the judge did not err by admitting and relying on Dr. McKay's note.

However, we agree with the insurer that the judge erred by admitting the FCE, over its timely objection, as part of Dr. McKay's records. The document was not prepared by a physician so it could not be admitted pursuant to 452 Code

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> by the impartial physician's deposition. Such medical reports . . . are intended to contribute to formulation of the impartial physician's opinion or to a showing that additional medical evidence is necessary. See G.L. c. 152, § 11A(2); O'Brien's Case, 424 Mass. 16, 23-24 (1996).

[4] The March 11, 2011 MRI, and the July 5, 2011, Cooley Dickinson Rehabilitation Services Summary were neither offered as part of the employee's medical evidence on September 7, 2011, nor relied on by the judge.

[5] The employee's additional medical evidence packet actually contained two notes from Dr. McKay dated July 11, 2011: an office visit note and an out of work note. (Employee Ex. 1.)

Mass. Regs. § 1.11(6).[6] Round v. King Size Co., 13 Mass. Workers' Comp. Rep. 98, 99 (1999)(report of a licensed social worker inadmissible under Rule 1.11(6) as it is not a report of a "physician"). Nor was it offered pursuant to G. L. c. 233, § 79G. Although the record purports to have been generated at Cooley Dickinson Hospital, it was not certified as a hospital record, which would have rendered it admissible under G. L. c. 152, § 20, or G. L. c. 233, § 79. The employee's purported compliance by admitting the FCE as part of Dr. McKay's office records pursuant to G. L. c. 152, § 20, was ineffective. First, Dr. McKay's office's certification of the records bore a date prior to the date of the evaluation. Second, it is questionable whether Dr. McKay's certification could apply to a document that did not emanate from her office, was not even addressed to Dr. McKay, and was not shown to have been reviewed by her. As offered, the FCE report was inadmissible hearsay. In apparent recognition of this fact, the judge stated he allowed the FCE to be admitted "pursuant to my authority – Chapter 152, Section 11."[7] (Dec. 2.) However, nothing in § 11 permits the judge to consider, over a party's objection, material that is not admitted in compliance with the rules of evidence.

> [A]lthough a judge has investigatory powers under G. L. c. 152, § 11, such authority remains subject to the rules of evidence applicable to hearings within the division of dispute resolution. See Haley's Case, 356 Mass. 678, 682 (1970)("Nothing can be considered or treated as evidence which is not introduced as such"); 452 Code Mass. Regs. § 1.11(5)("[T]he admissibility

[6] Rule 1.11(6) provides:

> [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. . . .

[7] General Laws, c. 152, § 11, states in pertinent part:

> At the hearing the member shall make such inquires and investigations as he deems necessary, and may require and receive any documentary or oral matter not previously obtained as shall enable him to issue a decision with respect to the issues before him.

> of evidence and the competency of witnesses to testify at a hearing shall be determined under the rules of evidence applied in the courts of the Commonwealth").

McGrath v. NSTAR Elec. & Gas, 26 Mass. Workers' Comp. Rep. ___ (2012). Because the judge expressly relied in part on the erroneously admitted FCE in reaching his conclusion that the employee was permanently and totally incapacitated, (Dec. II, 4), the error cannot be considered harmless. See, e.g., Fantasia v. Northeast Mfg. Co., Inc., 14 Mass. Workers' Comp. Rep. 200, 205 (2000). Accordingly, we recommit the matter for further findings of fact without consideration of the FCE report.

So ordered.

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Catherine Watson Koziol
Administrative Law Judge

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Mark D. Horan
Administrative Law Judge

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Bernard W. Fabricant
Administrative Law Judge

Filed: ***October 10, 2012***